

2003

Free Association: The United States Experience

Chimène Keitner

UC Hastings College of the Law, keitnerc@uchastings.edu

W. Michael Reisman

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [International Law Commons](#)

Recommended Citation

Chimène Keitner and W. Michael Reisman, *Free Association: The United States Experience*, 39 *Tex. Int'l L.J.* 1 (2003).

Available at: http://repository.uchastings.edu/faculty_scholarship/318

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications

UC Hastings College of the Law Library

Author: Chimène Keitner

Source: Texas International Law Journal

Citation: 39 Tex. Int'l L.J. 1 (2003).

Title: *Free Association: The United States Experience*

Originally published in TEXAS INTERNATIONAL LAW JOURNAL. This article is reprinted with permission from TEXAS INTERNATIONAL LAW JOURNAL and University of Texas, Austin, School of Law.

Free Association: The United States Experience

CHIMÈNE I. KEITNER[†] AND W. MICHAEL REISMAN[‡]

SUMMARY

I.	INTRODUCTION.....	2
II.	ASSOCIATED STATES IN INTERNATIONAL LAW	4
III.	PUERTO RICO	12
	A. <i>Introduction</i>	12
	B. <i>A Social, Economic, and Political Survey</i>	15
	1. Descent and Language	15
	2. Religion.....	15
	3. National Identity	15
	4. Political History	16
	5. Development of the Puerto Rican Political Economy.....	19
	6. Toward a Commonwealth Arrangement.....	21
	7. The Legal Relationship of Puerto Rico to the United States Under American Law.....	24
	8. Foreign Affairs.....	27
	9. The Legal Status of Puerto Rico Under International Law.....	29
	10. Participation in the International Process.....	33
IV.	THE TRUST TERRITORY OF THE PACIFIC ISLANDS	33
	A. <i>A Historical Overview</i>	33
	B. <i>The Commonwealth of the Northern Mariana Islands</i>	38
	1. A Social and Economic Survey.....	38
	2. Toward a Commonwealth Arrangement.....	39
	3. Legal Relationship to the United States Under American Law	41
	4. Foreign Affairs.....	43
	5. Legal Status Under International Law	43
	6. Participation in the International Process.....	44
	C. <i>The Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau</i>	45
	1. A Social and Economic Survey of the RMI.....	45
	2. A Social and Economic Survey of the FSM	46
	3. A Social and Economic Survey of Palau	46
	4. Toward Free Association: The RMI and the FSM.....	48
	5. Toward Free Association: Palau	50
	D. <i>A Political Survey of the Freely Associated States</i>	51
	1. Legal Relationship to the United States Under American Law	51
	2. Foreign Affairs.....	52

[†] D.Phil. in International Relations (Oxford), J.D. (Yale). Associate, Lieff, Cabraser, Heimann and Bernstein, LLP.

[‡] Myres S. McDougal Professor of International Law, Yale Law School.

3. Legal Status Under International Law.....	54
4. The Question of Military Servitudes	55
5. Participation in the International Process	58
V. CONCLUSION	62
VI. APPENDIX	63

I. INTRODUCTION

The ongoing reconfiguration of the international political system at the turn of the twenty-first century points to the need for a range of self-determination options for peoples around the globe. This article outlines the basic features of free association, one of the three options for a self-determining people under General Assembly Resolution 1541.¹ An association is formed when two states of unequal power voluntarily establish durable links. In the basic model, one state, the associate, delegates certain responsibilities to the other, the principal, while maintaining its international status as a state. Free associations represent a middle ground between integration and independence.² International legal scholars and practitioners should not neglect the potential benefits of free association in designing legal and political relationships within and between states.

Three states have compacts of free association with the United States that codify this arrangement: the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. However, associations do not need to be called associations in order to provide similar benefits. The Commonwealth of the Northern Mariana Islands and the Commonwealth of Puerto Rico also enjoy significant internal self-government and a degree of separate international personality. The details of these relationships, which we explore below, indicate the wide range of possibilities available to political communities seeking certain benefits of sovereign statehood but unwilling or unable fully to bear its burdens.

We were invited to write this article as a follow-up to W. Michael Reisman's 1975 study, *Puerto Rico and the International Process: New Roles in Association*.³ Lawyers and political leaders in communities seeking a greater degree of self-determination turned to the 1975 study as a guide to the experience of the United States with free association arrangements, and to the relevant international legal principles and precepts. This article brings that study up-to-date and expands the discussion of the U.S. experience beyond Puerto Rico to include the former Trust Territory of the Pacific Islands. It documents the historical and political background of these associations, and it enumerates the principles that govern the creation and maintenance of free association arrangements in accordance with international law. It indicates what free association is, how it has been implemented, and what we perceive to be its strengths and drawbacks. The examples are drawn from the experience of the United States, but the concepts and principles they illustrate are applicable worldwide.

Before we proceed, a caveat with respect to the legal term "associated state" is in order. Words are not, as Justice Holmes said, crystals. Words acquire their meaning in contexts; when contexts change, so too do the meanings. The far-reaching transformations in international politics that are referred to as "globalization" or "interdependence" have radically changed the notion and reality of the independence of a state and its sovereignty.

1. G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

2. See *infra* Appendix.

3. See generally W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* (1975).

This is a necessary caution in introducing the legal relationship between states and associated states in contemporary international law. As even the lone superpower learns and relearns, no state in the twenty-first century is absolutely sovereign. None is capable of going it alone in the external arena. Moreover, the increasing ambition and breadth of the body of international law aimed at the protection of human rights and the expansion and increasing effectiveness of international economic law have substantially reduced the ambit of choice of states, and even their competence to regulate events in their domestic jurisdiction. This is not to say that all states are now “associated.” But it does mean that a consideration of the arrangements by which associations are formed in international law must take account of interdependence, and of the resulting conceptual and experiential limitations on state independence and sovereignty.

Interdependence has also affected the theory of self-determination. Claims to self-determination, once viewed as virtually sacred and as *jus cogens*, are increasingly assessed in terms of their aggregate consequences on the regions in which the aspirant to self-determination is found, and on the global community as a whole. In *An Agenda for Peace*, U.N. Secretary-General Boutros Boutros-Ghali observed:

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.⁴

Yet, as the International Court of Justice said in its 1975 opinion in *Western Sahara*, the demand for and right to self-determination continues to be a cardinal principle of international law.⁵ This remains true today, but the global political context within which self-determination operates, and the concrete territorial and institutional entitlements it may entail, are continually evolving. The accommodation between international law’s support for the right of individuals to form political communities under the protection of international law, on one hand, and the need for the creation and maintenance of viable communities able to contribute to the dignity of the lives of their inhabitants and to world order, on the other, may require new forms of political and territorial organization, including new modes of association between states. Precisely because each association involves the surrender of some degree of control over the destiny of the community to another state, it is all the more important that international law establish clear criteria and appropriate procedures of supervision for associations, even after a threshold determination has been made that the association is legal.

Our article shows, we hope, that political experiments conducted, first, by the United States and Puerto Rico and, second, by the United States and the former Trust Territories of the Pacific Islands, demonstrate the flexibility and space for creativity in fashioning

4. Report of the Secretary-General, *An Agenda for Peace—Preventative Diplomacy, Peacemaking and Peace-keeping*, U.N. GAOR, 47th Sess., Agenda Item 10, para. 17, U.N. Doc. S/24111 (1992), reprinted in 31 I.L.M. 953, 959.

5. Advisory Opinion No. 61, *Western Sahara*, 1975 I.C.J. 12, 21–25 (Oct. 16).

associations so that they can provide significant benefits to the associated states while preserving their essential autonomy.

II. ASSOCIATED STATES IN INTERNATIONAL LAW

A major thrust of contemporary international law has been self-determination and the acceleration toward "independence" of territorial communities about the globe.⁶ The explicit language of the U.N. Charter, General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, its subsequent corollaries, and holdings of the International Court of Justice,⁷ as well as the activities of many components of the United Nations, have raised these issues virtually to the status of a peremptory norm or a "higher law,"⁸ especially in the context of decolonization. Fostering more independent communities as one realization of self-determination does not make nor seek to make each community identically equal. Self-determining entities, and in particular former colonies, are offered three options: emergence as a sovereign independent state, free association with an independent state, and integration with an independent state. Each of these arrangements is deemed to entail "a full measure of self-government,"⁹ even though two of them do not involve full independence; territorial communities exercise their right to self-determination by choosing among these options.¹⁰

Territorial communities are not factually equal. Some are larger and some more powerful than others. "Pecking orders," the familiar patterns of social superordination and subordination, are established for many different purposes and with many different positive and negative social effects. Historically, international practice has always manifested a rich diversity in participation, and the word "state" has been used to cover a rather wide spectrum of territorial phenomena.¹¹ While fundamental norms of international law profess the "sovereign equality"¹² of all states and many institutional arrangements seek to implement equality,¹³ critical institutions and practices recognize and take account of de facto inequalities.¹⁴ The international decision process accommodates as best it can the exigencies of power allocation with the major normative goals that are articulated and pursued by actors in the international system.

6. Parts II and III of this article are based on REISMAN, *supra* note 3.

7. U.N. CHARTER art. 1, para. 2; U.N. CHARTER art. 55; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, Annex, International Covenant on Civil and Political Rights, art. 1, para. 1, at 53, U.N. Doc. A/6316 (1966); *see also* G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960), reaffirmed in a sequence of resolutions, including G.A. Res. 2621, U.N. GAOR, 25th Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); G.A. Res. 2878, U.N. GAOR, 26th Sess., Supp. No. 29, at 16, U.N. Doc. A/8429 (1971), and in Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57-58 (June 21).

8. Rupert Emerson, *The New Higher Law of Anti-Colonialism*, in *THE RELEVANCE OF INTERNATIONAL LAW* 153 (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

9. G.A. Res. 1541, *supra* note 1, at 29.

10. Our reflections here are confined to the political options facing territorial communities constituted as such; we do not address the issue of redrawing borders or that of secession, although these are also matters of inclusive international concern.

11. *See* 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 283 (2d ed. 1970) ("The term 'State' is no term of art. . . . The sense in which it is used will depend upon the context.").

12. U.N. CHARTER art. 2, para. 1.

13. *See, e.g.*, U.N. CHARTER art. 18, para. 1 (declaring that each member of the General Assembly receives one vote).

14. *See, e.g.*, U.N. CHARTER ch. V (establishing the U.N. Security Council); Advisory Opinion No. 43, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8).

Where two states of unequal power establish formal and durable links, we may speak of an “association.” In terms of the power relationships we have just described, “associations” are hardly novel. In terms of authority, however, there are significant innovations. A relationship of association in contemporary international law is characterized by recognition of the significant subordination and delegation of competence by one of the parties (the associate) to the other (the principal), but maintenance of the continuing international status of statehood of each component.¹⁵ In contemporary international law the relation of association, despite its domestic or internal features, remains a matter of inclusive concern for the international community. Many policies, some of them peremptory, now reach communities and individuals in them without regard to the formal status established by authoritative or effective national elites. For example, self-determination and the complex of other human rights cannot be barred by the claim of domestic jurisdiction.¹⁶ A pattern characterized by the continuing subordination of one community is a constant invocation of international scrutiny.

Invocation is not conviction. Not all associations are deemed unlawful or international legal “pathologies.” Associations can be legitimate and mutually beneficial relationships, but they also involve costs and uncertainties. This section considers briefly the theory and the more general practice of the international system with regard to communities in de jure and de facto associations in which choices of the associate are manifestly subordinated to the principal in whole or significant part. The balance of this study reviews the compacts of free association between the United States and Puerto Rico (Part III) and the former Trust Territory of the Pacific Islands (Part IV). Our goals are both descriptive and normative: to outline the current practice of the United States in this area and to evaluate its implications for the concept of free association in international law.

Associations as such are not unlawful, either under past doctrines or under Resolutions 1514 (XV) and 1541 (XV).¹⁷ Nor does the appellation of association automatically confer legality on colonial subordination. The key to legality, and to an association’s acceptance by the international decision-making process, is the substance of the relationship, not its label. No one, for example, assumed that the colonial wars in Portuguese Africa ceased to be such because metropolitan Portugal formally announced that the overseas territories were now integral parts of Portugal, or that the character of the Algerian war of independence was in fact different because France solemnly insisted that Algeria was an integral part of metropolitan France. Form is not determinative: the lawfulness of particular associations is determined by content and not by form.

Critical factors in determining the international lawfulness of an association between two distinct communities in which there is subordination can be learned from General Assembly Resolution 1541 (XV) of December 14, 1960.¹⁸ This Resolution is particularly instructive, for it was passed on the same day that the Assembly made the historic

15. See Margaret Broderick, *Associated Statehood—A New Form of Decolonisation*, 17 INT’L & COMP. L.Q. 368 (1968) (providing much detail on institutionalizations of association between former metropolitans and former colonies, but lacks a certain historical perspective).

16. See Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT’L L. 1, 16 (1968) (introducing an early example of this idea).

17. See G.A. Res. 2064, U.N. GAOR, 20th Sess., Supp. No. 14, at 56, U.N. Doc. A/6014 (1965) (approving associated status of Cook Islands); G.A. Res. 1626, U.N. GAOR, 16th Sess., Supp. No. 17, at 33, U.N. Doc. A/5100 (1962) (revoking the Trusteeship Agreement for Western Samoa).

18. G.A. Res. 1541, *supra* note 1, at 29. The United Nations declared 1990–2000 the “International Decade for the Eradication of Colonialism,” and 2001–2010 the “Second International Decade for the Eradication of Colonialism.” G.A. Res. 43/47, U.N. GAOR, 43d Sess., Supp. No. 49, at 49, U.N. Doc. A/43/49 (1988); G.A. Res. 55/146, U.N. GAOR, 55th Sess., Supp. No. 49, at 96, U.N. Doc. A/55/49 (2000).

“Declaration on the Granting of Independence to Colonial Countries and Peoples.”¹⁹ It can thus be viewed as an authentic explanation of how to grant independence. Resolution 1541 (XV) includes the following indicators of lawfulness:

- (i) The extent of the consent, *among the broad population*, of the associate to the association. Principle VII of the annexed principles to Resolution 1541 (XV) states:
 - (a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
 - (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.²⁰

Note here the distinction between the classic protectorate and the contemporary associate. In the former, the consent of the elite or the effective leader would have been sufficient with virtually no scrutiny from without of the degree of popular support that the elite or leader might have. In contemporary practice, the demand for a plebiscite or some other reliable consultation of popular will indicates that dispositions of territorial communities can be effected lawfully only with the free and informed consent of the members of that community.²¹

- (ii) The extent to which the association conduces to a better fulfillment of the human (including economic and social) rights deemed under contemporary prescriptions to be minimum international standards. A significant general indicator of this demand is the express language in mandate and trust agreements as well as in Charter Article 73 stipulating how effective power is to be used in non-self-governing territories:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full

19. G.A. Res. 1514, *supra* note 7, at 66.

20. G.A. Res. 1541, *supra* note 1, at 29–30.

21. See Lung-chu Chen & W. Michael Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 660–69 (1972). The Annex to the Report of the Secretary-General on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples emphasizes the importance of the free, uncoerced, and well-informed exercise of the right to self-determination, and in particular the right of peoples of Non-Self-Governing Territories to “decide their future political status with complete knowledge and awareness of the full range of political options available to them, including independence.” *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 46th Sess., Annex, Agenda Item 19, at 3, U.N. Doc. A/46/634/Rev.1 (1991). Following this, the General Assembly, at its 78th plenary meeting in 1991, adopted an Action Plan for the International Decade for the Eradication of Colonialism, in which it declared “that exercise of the right to self-determination should be carried out freely and without outside pressure, in a form reflecting authentic interests and aspirations of the peoples of Non-Self-Governing Territories and with the United Nations playing an appropriate role.” G.A. Res. 46/181, U.N. GAOR, 46th Sess., Supp. No. 49, at 49, U.N. Doc. A/46/49 (1991).

measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature, relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.²²

Various criteria have been used in order to determine whether a particular association does in fact meet these two fundamental demands of lawfulness. These criteria, which include cultural, linguistic, or ethnic identity, and relative social and economic development, are not themselves prerequisites for lawful association, but they are critical indicators which must be examined. If there are cultural or linguistic differences between principal and associate, the international community will be more sensitive to the possibilities of self-determination being limited or autonomous cultural development being retarded. If there is an ethnic divergence between principal and associate, attitudes of ethnic superiority in the principal state may prevent the association from being conducive to the fulfillment of human rights. Principle IV of Resolution 1541 (XV) shifts the burden of proof in circumstances such as these onto the principal through the legal device of a presumption or *prima facie* case: “[p]*rima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”²³ The *prima facie* case then activates other criteria of international scrutiny. Principle V provides:

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be

22. U.N. CHARTER art. 73.

23. G.A. Res. 1541, *supra* note 1, at 29.

brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information, under Article 73 e of the Charter.²⁴

Disparities in social and economic development may limit full participation by the associate despite the fact that the instruments of association may promise broad participatory rights. Hence, the principles indicate some reluctance to authorize termination of non-self-governing status by integration when disparities prevail and, by implication, suggest that closer international scrutiny will be appropriate for an association characterized by such imbalances. Principle VIII provides:

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.²⁵

Principle IX continues:

Integration should have come about in the following circumstances:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
- (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.²⁶

Cultural, ethnic, and economic differences between associate and principal are not violations per se. Hence, in other circumstances, disparities in ethnicity, language, and culture, as well as social and economic development, may exist, yet the association itself can be determined to be lawful and not be subjected to that level of intense scrutiny and coordinate obligation involved in non-self-governing entities.

Besides voluntary integration under Principle VI(c), is there a "point of no return" beyond which a de jure or de facto "associate" is no longer considered a "state" in the general international legal acceptance of the term, but is deemed instead an integral part of the principal state? (Such incorporation would presumably bar the former associate from

24. *Id.*

25. *Id.* at 30.

26. *Id.*

access to a number of formal international arenas, but would not prevent it from acting as a claimant in many situations. There are obviously many forms of claimant other than the nation-state.) A survey of practice suggests that there are no hard and fast rules, the determination being a conclusion drawn from many features of each context and tested against many policies. A number of examples should demonstrate the danger of using single, seemingly “obvious” indicators to assess the transition from association to integration, and conclude without further inquiry that integration has occurred.

1. Common citizenship or nationality would appear to be an obvious indicator of integration. But, in fact, common citizenship with a principal has not been deemed to extinguish the separate international existence of an associate. Thus, the British Nationality Act of 1948 provided in Section 1:

1.—(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.

(2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen; and accordingly in this Act and in any other enactment or instrument whatever, whether passed or made before or after the commencement of this Act, the expression “British subject” and the expression “Commonwealth citizen” shall have the same meaning.

(3) The following are the countries hereinbefore referred to, that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon.²⁷

A comparable provision was Article 77 of the 1958 French Constitution as amended in 1960.²⁸ Notwithstanding these provisions, many members of the British Commonwealth and the French Community were admitted to the United Nations. While rejection of an applicant to the United Nations does not mean that it is not a “state,” admission of a community as a U.N. member (as opposed to an observer) would appear to indicate clearly that a particular applicant is deemed to be a state in the international community.

2. Common trade agreements or common currency agreements have also not been deemed to extinguish the individual international personality of associates. Thus, in the *Austro-German Customs Regime* case,²⁹ the Permanent Court of International Justice struck down a proposed customs regime between Austria and Germany because it violated specific prohibitions imposed on Austria in Article 88 of the Treaty of St. Germain, rather than because a customs regime per se involved an alienation of independence. As the Court put it:

the establishment of this régime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view, if not of the reciprocity in law, though perhaps not in fact, implied by the projected treaty, at all events of the possibility of denouncing the treaty, it

27. British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 1 (Eng.).

28. CONST. art. 77 (Fr.).

29. Advisory Opinion No. 41, *Customs Régime Between Germany and Austria*, 1931 P.C.I.J. (ser. A/B) No. 41, at 37 (Sept. 5).

may be said that legally Austria retains the possibility of exercising her independence.³⁰

Though successive stages of European economic integration have foreshadowed a “United States of Europe,” the customs regime established by the Treaty of Rome³¹ and the program for economic and monetary union adopted at Maastricht³² have not been deemed to extinguish the independence or international legal personality of the European Union’s Member States.

3. Delegation of foreign affairs competence has also not been deemed to extinguish the international personality of a territorial community. In the *Case Concerning Rights of Nationals of the United States of America in Morocco*, the International Court stated:

It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law. The rights of France in Morocco are defined by the Protectorate Treaty of 1912.³³

The Court continued:

[u]nder [the Treaty of Fez of 1912], Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco.³⁴

A line of English cases from the last century also supports this view.³⁵ The admission of Cyprus to the United Nations also demonstrates that the reservation of broad military privileges or “military servitudes”³⁶ by the former principal does not extinguish independence.³⁷ Even the Free City of Danzig, with the peculiar limitations on its foreign affairs powers which were built into its very existence, was confirmed as a separate state both in international political practice as well as by the jurisprudence of the Permanent Court of International Justice.³⁸ As the Court put it in the *Danzig* opinion:

30. *Id.* at 52; *see also id.* at 48–49 (observing that Austria is obliged to abstain from compromising its independence). Of course, the word “independence” in Article 88 of the St. Germain Treaty conveyed a totally political conception of European security. As the Court tersely put it at the very outset of its opinion, “Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system.” *Id.* at 42.

31. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11.

32. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247.

33. *Case Concerning Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 185 (Aug. 27).

34. *Id.* at 188.

35. *See, e.g.,* *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 154–62 (Eng. C.A. 1893) (explaining that the treaty of alliance with England does not deprive Johore of its independence); *Duff Dev. Co. v. Gov’t of Kelantan*, [1924] A.C. 797, 808 (H.L. 1924) (Eng.) (“[N]otwithstanding the engagements entered into by the Sultan of Kelantan with the British Government . . . His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country.”).

36. Albert J. Esgain, *Military Servitudes and the New Nations*, in 3 THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY: THE YEARBOOK OF WORLD POLITY 42, 42 (William V. O’Brien ed., 1965).

37. Treaty Concerning the Establishment of the Republic of Cyprus, Aug. 16, 1960, U.K.-Greece-Turk.-Cyprus, 382 U.N.T.S. 9, 38.

38. For a survey of virtually all the decisions made in the League on Danzig’s status, see JOHN BROWN MASON, THE DANZIG DILEMMA: A STUDY IN PEACEMAKING BY COMPROMISE 238–41 (1946). For a compendium of treaty and diplomatic practice, *see id.* at 228–47. Issues related to Danzig’s status came before the Permanent Court on a number of occasions. *See, e.g.,* Advisory Opinion No. 18, *Free City of Danzig and Int’l Lab. Org.*, 1930 P.C.I.J. (ser. B) No. 18, at 13 (suggesting that notwithstanding its special relationship with Poland, the Free

the Treaty of Versailles is the source of the rights conferred on Poland in accordance with Article 104 . . . so far as these rights involve a limitation of the independence of the Free City, they constitute organic limitations which are an essential feature of its political structure.³⁹

In short, it has been long understood that delegations of foreign affairs competence do not indicate an absence of statehood.

4. Subordination to the highest judicial instance of the principal state has also not been deemed to extinguish independent international existence. Many of the members of the Commonwealth retained varying ties with the Judicial Committee of the Privy Council without jeopardizing recognition of their international personality.⁴⁰

The single most critical factor in contemporary international law that would indicate the lawful transition from association to integration, would appear to be the demands of the people within the associate. If they express a desire to terminate their international existence and to merge with a larger community, this will be recognized by the rest of the world community. Thus, in the case of Syria and the United Arab Republic,⁴¹ West Irian and Indonesia,⁴² and the Northern Cameroons and Nigeria,⁴³ overt and allegedly uncoerced demonstrations of popular sentiment were accepted by the international community as mergers. Note, however, that a subsequent expression of popular will to terminate a consummated "merger" has, in at least one case, been acceded to.⁴⁴ Recognition of conceptual and logistical difficulties in assessing the will of the relevant population means that the international community might not always accept at face value the expression of integrationist desires.

Possible forms of legal association are multiple, and the rights and duties of associated states in international law vary according to activity, organizational setting, and the terms of association. As the International Court put it in the *Reparations* case, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."⁴⁵

City of Danzig is entitled to look out for its own interests and to represent itself); Advisory Opinion No. 44, Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, 1931 P.C.I.J. (ser. A/B) No. 43, at 18 (detailing Danzig's treatment as an independent political entity); Advisory Opinion No. 42, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 44, at 23-24 (suggesting that the sui generis status of the Free City of Danzig does not preclude the application of international over municipal laws in a dispute between Danzig and Poland). In the *War Vessels* case, Danzig appointed an ad hoc judge. *Polish War Vessels*, 1931 P.C.I.J. at 131.

39. *Free City of Danzig*, 1930 P.C.I.J. at 11.

40. See, e.g., Agreement for the Reference of Appeals from the Supreme Court of the Federation of Malaya to the Judicial Committee of the Privy Council, Mar. 4, 1958, U.K.-N. Ir.-Malaya, 314 U.N.T.S. 253 (demonstrating ties between members of the Commonwealth and Great Britain).

41. *Note verbale dated 7 March 1958 from the Secretary-General to the President of the Security Council*, U.N. SCOR, 13th Sess., Supp. Jan.-Mar. 1958, at 31-32, U.N. Doc. S/3976 (1958); see also Notification About United Arab Republic, 1958 U.N.Y.B. 106, U.N. Sales No. 59.I.1. For the sequence of events involved in the "reactivation" of Syria's membership, see The Admission of New Members and Related Matters, 1961 U.N.Y.B. 166, 168, U.N. Sales No. 62.I.1.

42. Irian Jaya, *Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)*, Aug. 15, 1962 (restating the agreement signed at the U.N. Headquarters on August 15, 1962), available at http://www.indonesia.nl/articles.php?rank=7&art_cat_id=53 (last visited Oct. 29, 2003). For a review of the case, see Chen & Reisman, *supra* note 21, at 663 n.244.

43. G.A. Res. 1608, U.N. GAOR, 15th Sess., Supp. No. 16A, at 10-11, U.N. Doc. A/4684/Add.1 (1961).

44. *Id.* at 10; Concerning the Northern Cameroons (Cameroon v. United Kingdom), 1963 I.C.J. 15 (Dec. 2).

45. Advisory Opinion No. 4, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11).

Associated states have concluded treaties, are members of the United Nations and specialized agencies, are members of the International Court of Justice, and have been parties to contentious cases before that tribunal.⁴⁶ The Covenant of the League of Nations permitted colonies to become members of the League.⁴⁷ While the U.N. Charter is not as explicit as Article 1 of the Covenant on the point, practice, as will be shown, makes clear that associated states may become U.N. members.

In the contemporary world, insufficient attention may have been given to the potential contribution of associate status to public order. Association involves a recognition of the political dependence of an entity, but also entails an insistence on the associate's continuing discrete identity under the international scrutiny accorded to all states. Especially during the Cold War, this represented an important status option for small states that found themselves in the comparatively uncontested sphere of one of the Great Powers; the "balance of power" might have availed the principal and its counterparts, but it did not provide opportunities for survival and minimum political effectiveness for associates. Today, the dominance of certain economic and political players in the international system may make association a worthwhile status for smaller states. By seeking membership in international organizations, smaller states can concede dependence in one arena, while asserting their independence in another; membership itself becomes some guarantee of continued independence. *The Economist* made the point with characteristic bluntness in regard to Kuwait: "[c]ertainly Kuwait has built up a surer defence by getting itself accepted as an independent state—or anyhow a fair imitation of one" than by British protection.⁴⁸ The rallying of an international coalition in 1991 to repel the Iraqi invasion of Kuwait would seem to confirm this observation.

A legal status is not a physical phenomenon; it is an artifact, a human creation. Its content and social significance are a product of what its designers seek and what the political context (itself subject to shaping) allows. In certain politically charged areas, such as the West Bank of Israel, the possibility for a meaningful regional accommodation based on the principle of association seems remote. In other areas, such as Taiwan, the concept of free association might yet hold some promise, even if political tensions preclude the immediate likelihood of constructive innovation. In a world where independent states exist within increasingly constraining economic, legal, and even political frameworks, free association can provide a basis for a range of constructive state relationships on the spectrum between full independence and integration.

III. PUERTO RICO

A. Introduction

Puerto Rico, the easternmost island of the Greater Antilles, is located 75 miles due east of the Dominican Republic and just west of the Virgin Islands.⁴⁹ A little more than 100 miles in length and 35 miles in width, its total area is 3435 square miles, approximately 55 square miles of this being water.⁵⁰ The population according to the 2000 census was 3.8

46. See table *infra* Part IV.D.5.

47. LEAGUE OF NATIONS COVENANT art. 1.

48. *Phantom War in the Desert*, *ECONOMIST*, May 21, 1966, at 802, 803.

49. Welcome to Puerto Rico, *Geography*, at <http://welcome.topuertorico.org/geogra.shtml> (last visited Oct. 29, 2003).

50. Welcome to Puerto Rico, *Description*, at <http://welcome.topuertorico.org/descrip.shtml> (last visited Oct. 29, 2003).

million, giving Puerto Rico a density of 1100 persons per square mile.⁵¹ Since 1952, the people of Puerto Rico have associated themselves with the United States as an associated “estado libre” or “commonwealth”—a status interpreted in complex and contradictory ways by U.S. government agencies and by the Federal Congress.⁵² As a matter of international law, Puerto Ricans (and, for that matter, all peoples) may change their status if and when they so desire.⁵³ Three options have been forwarded regularly by advocates in the vigorous political life of the island: assimilation into the United States as a component state in the union, severance from the United States and transformation into a “sovereign” state, or continuation as a commonwealth, an “estado libre” in voluntary association with the United States.

On repeated occasions, Puerto Ricans have opted for continuation as an associated state, most recently in 1998.⁵⁴ Even though Puerto Rico is not a member of the United Nations, Puerto Rico’s ability to participate in the international system is undisputed.⁵⁵ But how to participate in ways that best contribute to the realization of Puerto Rican national, cultural, economic, and social goals remains an open question. Questions also persist about the appropriate relationship between the United States, and particularly the U.S. military, and Puerto Rico, as evidenced by continuing disputes over the activities of the U.S. Navy on the island of Vieques. The problem of how to balance the benefits of association with its potential costs and compromises remains central, even for “seasoned” associated states such as Puerto Rico. The centrality of the “status question” to Puerto Rican consciousness has not produced consensus, or even a clear majority, in favor of a particular arrangement. It is therefore not surprising to find other small territorial communities about the globe struggling with a similar dilemma: how best to establish and maintain links with larger social and wealthier economic systems, to retain and develop an indigenous culture, and to be effective in the comprehensive world political process that increasingly penetrates and shapes much of local community life?

Puerto Ricans are distinctive in the American family: they are caught in a strange limbo as far as the foreign policy process is concerned. They are a discrete and numerically significant community (nearly four million people on the island alone), but because they are not a “territory,” they cannot participate in those international organizations which allow a “territorial” exception. Because they are not a “state of the Union,” they have no effective input into congressional participation in the foreign policy process. Because they are not organized as an interest group, they have not refined the informal techniques of influence

51. *Profile of General Demographic Characteristics for Puerto Rico: 2000*, at http://www.census.gov/Press-Release/www/2001/tables/dp_pr_2000.PDF (last modified Oct. 9, 2001) (dividing population by total area in square miles yields a population density of 1100 persons per square mile).

52. Welcome to Puerto Rico, *Government*, at <http://welcome.topuertorico.org/government.shtml> (last visited Oct. 29, 2003).

53. For a discussion of the right of self-determination, see, for example, Chen & Reisman, *supra* note 21, at 655–56. For one early recognition of the “right of revolution,” see the award of Chief Justice Taft, sitting as sole arbiter in the Tinoco Case (Gr. Brit. v. Costa Rica), *Judicial Decisions Involving Questions of International Law*, 18 AM. J. INT’L L. 147, 154 (1924) (reproducing the arbitration between Great Britain and Costa Rica).

54. This last referendum was held on Dec. 13, 1998. According to the U.S. Department of the Interior (which maintains information on Puerto Rico although it does not administer the island), “[t]he political status debate continues, in part, because the last plebiscite, held on December 13, 1998, failed to yield a majority vote on any of the five options: 0.29% enhanced commonwealth, 46.4[%] statehood; 2.5% independence, 0.06% free association, 50.3% none of the above.” U.S. Dep’t of the Interior, Office of Insular Affairs, *Fact Sheets* (Aug. 2000), at <http://www.doi.gov/oia/Islandpages/prpage.htm> (last visited Oct. 29, 2003).

55. For example, Puerto Rico participates directly in the following international organizations: Caricom (observer), ECLAC (associate), FAO (associate), ICFTU, Interpol (subbureau), IOC, WCL, WFTU, WHO (associate). CIA, *The World Factbook* (2001) [hereinafter *World Factbook I*], available at <http://www.cia.gov/cia/publications/factbook/geos/rq.html> (last visited Oct. 29, 2003).

that facilitate power sharing in our system. Nor have alternative forms of “consultation” between the executive branch and the government of the Commonwealth been worked out; while, on very rare occasions, individual Puerto Ricans have been appointed to American delegations, this is not a systematic device for presentation of Puerto Rican views to the world. Puerto Rico is as influenced by world affairs as any other territorial community but has virtually no influence on most of the international decisions that may shape its destiny.

In another sense, changes in world affairs press Puerto Rico toward international participation *as a way of maintaining effective internal autonomy*. The increasing social ambitions of domestic governments require recruitment of resources from the entire world arena. The inability to turn to the world is translated into a lessened internal effectiveness. It is now routine for states and even some cities within the United States to send trade delegations abroad.⁵⁶ No less, Puerto Rican effectiveness increasingly requires international activity for those sectors deemed appropriate for autonomous activity.

In our analysis, primary emphasis has been put on the international dimension. We believe the legal materials presented here show that the Commonwealth of Puerto Rico is an associated state, an international entity rather than an integrated component of another international entity; that many international institutional arrangements have been made for the participation of associated states in the world political system; and that Commonwealth participation in a number of international institutional settings offers policy advantages for both the Commonwealth and the United States. We do not explore such international questions as Puerto Rican modalities for ratifying international agreements, or possible changes in the “Compact” between the United States and Puerto Rico, in the Puerto Rican Federal Relations Act, nor in the Puerto Rican Constitution. Nor are we concerned with American constitutional law as it might pertain to this problem.⁵⁷ Inherent powers to conduct foreign relations, flexibility in regard to compacts between component states of the Union and foreign states, and the general resilience of the American constitutional system all indicate that constitutional “problems” about international roles for the Commonwealth can be resolved quickly—if a political decision to do so is made. Many of the issues essayed here present fruitful avenues for further inquiry; we hope that our readers, rather than finding this cause for dissatisfaction, will be inspired to pursue these avenues in their own research.

56. See, e.g., *Looking to Sell, Buy South of Border*, HOUSTON CHRON., Aug. 24, 2003, at 7; *Countdown to Beijing Olympics California Firm Pitch Services to Bustling Market*, CAL. CONSTRUCTION LINK, Mar. 1, 2003, at 27; Tim Sullivan, *Utah Trade Delegation Seeks to Develop Mexican Business Connections on Trip*, SALT LAKE TRIB., Feb. 5, 2003; *U.S. Houston Trade Delegation Arrives in Saudi Arabia*, SAUDI ARABIAN NEWS DIG., Oct. 29, 2002, available at 2002 WL 4340289.

57. Article I, section 10 of the Constitution prohibits States from engaging in treaties with foreign states. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”). But Puerto Rico is not a State in the Union and, moreover, the Supreme Court has approved certain compacts between States of the Union and foreign states, which were not expressly agreed to by Congress. As a general policy, the Court appears to have reduced the absolute prohibition of Article I, section 10 to a relative bar. In *Virginia v. Tennessee*, the Court stated that States could compact without Congressional approval when the compact did not “tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.” *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893). For surveys of agreements without congressional consent, see Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 749–54 (1925); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 228–34 (1972); see also W. Michael Reisman & Gary J. Simson, *Interstate Agreements in the American Federal System*, 27 RUTGERS L. REV. 70, 78–79 (1973) (discussing the framers’ intent to allow some contracts between states and foreign powers). For more recent agreements between States and foreign entities, see Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 266 n.256 (1967); HENKIN, *supra*, at 233.

B. *A Social, Economic, and Political Survey*

1. Descent and Language

Puerto Rico's society is, though extremely stratified,⁵⁸ internally homogeneous, but remarkably distinct from both its island neighbors and the United States. The majority of the people are of Spanish descent, including recent immigrants from neighboring Caribbean islands, such as Cuba and the Dominican Republic, with some African and Indian strains. Spanish is the common and, for most, the first language. Although Puerto Rico is officially bilingual, the number of Puerto Ricans who can read, write, and speak both English and Spanish is small. Spanish is the language of home, of business, and of government, and the majority of the media operates exclusively in Spanish.

2. Religion

The dominant religion is Roman Catholicism, which is observed by an estimated 85% of Puerto Ricans.⁵⁹ The church's dogma is supposed to contribute to what one writer has referred to as the "fatalistic" outlook of Puerto Rican society: projecting an established social order and a promise of life after death, it supposedly places a high value on stoicism and teaches that one must accept God's will whether it bring good fortune or poor.⁶⁰ Yet Tumin and Feldman have concluded that in Puerto Rico "major social transformations seem eminently possible without much help or hindrance from the institutional forms of religious belief and worship."⁶¹ While, as in Québec, cultural distinctiveness is intimately bound up with both religion and language, language seems to provide a more salient identity platform and cultural marker than religion in the contemporary North American context.

3. National Identity

A great complex of factors indicates the extent and intensity of a distinct Puerto Rican identity. Puerto Ricans have their own flag and national anthem. They celebrate a unique mix of special holidays and holy days, which reflect meaningful aspects of Puerto Rican history and culture.⁶² Some of the *Dias de Fiesta* commemorate the abolition of slavery in Puerto Rico in 1873, the establishment of the Commonwealth government in 1952, and the *Grito de Lares* insurrection in 1868 against the Spanish colonial authorities.⁶³ Holidays honor such men as Eugenio María de Hostos, writer, abolitionist, and educator; José de

58. It is difficult to obtain statistics on income inequality in Puerto Rico; the U.S. census report on consumer income inequality does not include Puerto Rico, so its data on the "Hispanic" population refers exclusively to those living in the fifty states and District of Columbia. One helpful reference is FRANCISCO L. RIVERA-BATIZ & CARLOS E. SANTIAGO, *ISLAND PARADOX: PUERTO RICO IN THE 1990S* (1996).

59. See World Factbook I, *supra* note 55.

60. KAL WAGENHEIM, *PUERTO RICO: A PROFILE* 221–22 (2d ed. 1970).

61. MELVIN M. TUMIN & ARNOLD S. FELDMAN, *SOCIAL CLASS AND SOCIAL CHANGE IN PUERTO RICO* 296 (2d ed. 1971).

62. WAGENHEIM, *supra* note 60, at 230–33.

63. In 1868 there was a brief and unsuccessful uprising known as the *Grito de Lares* inspired by the separatist Dr. Ramón Emeterio Betances. Under the motto "Viva Puerto Rico Libre," the revolutionaries marched on Lares and declared the Republic of Puerto Rico. Although the rebels were soon crushed by the Spanish and the infant republic died aborning, the *Grito de Lares* is a continuing element of folklore and national identity. MANUEL MALDONADO-DENIS, *PUERTO RICO: A SOCIO-HISTORIC INTERPRETATION* 39–43 (Elena Vialo trans., 1972).

Diego, the first president of the Puerto Rican House of Representatives; and Luis Muñoz Rivera, a liberal journalist, writer, and poet who negotiated the Charter of Autonomy with Spain and later served as Puerto Rico's resident commissioner in Washington.

In common with other countries, Puerto Rico has its idealized folk hero, *El Jibaro*. In the eighteenth century, the rural people of Puerto Rico were called *jibaros*, and today the word expresses a nostalgia for, and idealization of, the old rural ways. To the Puerto Rican, *El Jibaro* is "the honest man, the man with both feet firmly planted on the soil, the man whose lack of schooling does not deprive him of a native shrewdness and wisdom that has something to do with the timelessness of nature."⁶⁴

El Jibaro has become, for many, a symbol of Puerto Rican culture and an expression of an intensely felt need to preserve the essence of that culture from the onslaught of Western and American culture.⁶⁵ However, the question of what political framework is most congenial to protecting and enhancing Puerto Rican cultural distinctiveness remains an open one. In particular, as noted above, debates persist about the respective desirability of the three self-government options: continuing local self-government as a territory in a commonwealth arrangement with the United States, separate sovereign statehood with either full independence or free association, and statehood within the U.S. federal union have all been considered.

4. Political History

For more than four centuries Puerto Rico was under the jurisdiction of the Kingdom of Spain. During that time the island advanced from the status of a colony, subject to the absolute authority of the Spanish governor general and his troops, to the status of an autonomous or semi-autonomous overseas province of Spain.⁶⁶ The most significant improvements in status were achieved in the nineteenth century. From 1812 to 1836 Puerto Rico was "granted equal status with that of Spanish provinces on the Iberian Peninsula."⁶⁷ However, in 1836 the liberal regime then in power was ousted by an absolutist, and Puerto Rico was returned to its former colonial status.⁶⁸ A Spanish revolution in 1868 improved the situation and Puerto Rico was again granted participation in the national councils of Spain.⁶⁹ As a result, Puerto Rican representatives helped draft the Spanish Constitution of 1876.⁷⁰

64. WAGENHEIM, *supra* note 60, at 228.

65. Several Puerto Rican writers and historians have identified the nineteenth century as the decisive period in the formation of a Puerto Rican culture, distinct from the Hispanic tradition. See, e.g., MALDONADO-DENIS, *supra* note 63, at 22. In that period all forms of cultural expression—literature, music, dance, art—apparently became something more than an extension of the Hispanic tradition. The depth of this feeling was dramatically revealed in 1968. Governor Ferré, of the New Progressive Party, was elected in November 1968. WAGENHEIM, *supra* note 60, at 85. Ferré introduced and popularized the concept of *jibaro* statehood, by which he expressed the belief that Puerto Rico could become a state of the United States without suffering cultural assimilation. *Id.* at 86. Commonwealth proponents have sought to interpret his defeat in 1972 and the return to power of the Popular Democrats as an expression by the Puerto Rican people of the belief that *El Jibaro* and statehood are incompatible, and that the national identity can best be preserved and strengthened by the development of the autonomous commonwealth status. See *id.* at 94–96.

66. HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., PUERTO RICO: A SURVEY OF HISTORICAL, ECONOMIC, AND POLITICAL AFFAIRS 1 (Comm. Print 1959).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Under this Constitution, the overseas provinces were entitled to voting representation in the Spanish *Cortes*⁷¹ and were to be governed in accordance with special laws.⁷² This provision, coupled with the increasing demands of the Puerto Rican people for self-government, eventually resulted in the Royal Decree of 1897 granting the island a charter of self-rule.⁷³ The Autonomic Charter was essentially a counterpart of the Spanish Constitution of 1876.⁷⁴

During this period, Puerto Rico itself had become the scene of increased political activity. In 1870 the Liberal Reformist Party was organized, and in 1873 its demands that slavery be abolished were acceded to.⁷⁵ Committed to autonomy within the Spanish Empire rather than independence, the Puerto Rican liberals changed the name of their party to the Puerto Rican Autonomist Party in 1887.⁷⁶ Ten years after the formation of the Puerto Rican Autonomist Party, its leader, Luis Muñoz Rivera, entered into an agreement of mutual support with Práxedes Sagasta, leader of the Spanish Liberal Party.⁷⁷ Perhaps because of this collaboration, when Sagasta became prime minister of the Spanish government in October 1897, Puerto Rico was granted its Charter of Autonomy within two months.⁷⁸

The Charter gave the insular government the power to govern in most matters of insular concern. The lower house of the legislature, which was completely elected,⁷⁹ had the power to initiate tax and credit legislation.⁸⁰ Municipalities were authorized to govern their own affairs under legislative guidance.⁸¹ Municipal or legislative acts contrary to the spirit of the Charter could be judicially challenged by aggrieved persons.⁸² The insular government also had some control over its external commercial relations: it had power to enact tariffs and to make commercial treaties under certain circumstances.⁸³ Puerto Rico participated as an equal in the Spanish Customs Union.⁸⁴ In these respects, the Puerto Rican local government possessed attributes of a fully sovereign state.

There were, however, significant reservations of royal power through the functions conferred upon the governor general of the island, an appointee of the king on nomination of the Council of Ministers. The governor general, in addition to exercising full executive authority, had the power to appoint members of the judiciary and to select for life tenure

71. C.E. of 1876, art. 88 (Sp.), *translated in* DOCUMENTS OF THE CONSTITUTIONAL HISTORY OF PUERTO RICO 21 (Office of the Commonwealth of Puerto Rico in Washington, D.C. ed., 2d ed. 1964) [hereinafter CONSTITUTIONAL HISTORY].

72. *Id.*

73. Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897, Nov. 25, 1897, *reprinted in* CONSTITUTIONAL HISTORY, *supra* note 71, at 22–46 [hereinafter Puerto Rico Charter].

74. The Charter did not include a Bill of Rights, but the Spanish Constitution did. Under the Charter the protection of the Spanish Bill of Rights could be invoked by the governor general. *Id.* art. 43.

75. MALDONADO-DENIS, *supra* note 63, at 36.

76. *Id.* at 28–29. Lidio Cruz Monclova, *The Puerto Rican Political Movement in the 19th Century*, in STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES PREPARED FOR THE UNITED STATES-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO 31–32 (1966).

77. MALDONADO-DENIS, *supra* note 63, at 48.

78. *Id.*

79. Puerto Rico Charter art. 11. Representatives were to be “named by the electoral boards in the manner prescribed by law.” *Id.*

80. *Id.* art. 21; *see also id.* art. 32 (delegating to the legislature the authority to govern purely local matters, including public credit, banks, and monetary systems); *id.* art. 35 (mandating that the responsibility of forming the national budget shall rest with the local legislature).

81. *See id.* tit. VIII.

82. Puerto Rico Charter art. 63.

83. *Id.* arts. 37–40.

84. *Id.*

seven of the fifteen members of the Council of Administration, which constituted the upper chamber of the legislature.⁸⁵ This potential for royal control was limited to some extent in two ways. A Charter provision provided that only the Chamber of Representatives, the lower house of the legislature, had the power to initiate tax and credit legislation.⁸⁶ Another provision stated that the Charter could not be amended "except by virtue of a law and on the petition of the insular parliament."⁸⁷

Despite these limitations, the Charter gave Puerto Rico a degree of self-government much greater than that later granted to Puerto Rico under the Foraker and Jones Acts of 1900 and 1917, the first organic laws approved under U.S. domination. With the Autonomist Party leader Luis Muñoz Rivera as president of the Council of Secretaries or, in effect, prime minister, the colonial Creole elite now came into formal power: for the first time, Puerto Ricans governed Puerto Rico. The interlude of self-government was brief and the Charter an extremely ambiguous political document. But it is a signal historical event, for it marks the beginning of a tradition favoring autonomy rather than independence or assimilation, which has continued as the mainstream of Puerto Rican political life.

The autonomist government functioned for only five months, brought to an abrupt end by the U.S. military invasion on July 25, 1898 and the subsequent defeat of Spain in the Spanish-American War. Under the terms of the Treaty of Paris⁸⁸ ending the war, Spain ceded Puerto Rico to the United States, providing that "the civil rights and political status . . . of the territories hereby ceded to the United States shall be determined by the Congress."⁸⁹ Thus, the U.S. Congress became the ultimate authority in the determination of the political status and operation of Puerto Rico.

During the eighteen-month interval between the end of the war and the enactment by Congress of the Foraker Act (April 1900),⁹⁰ U.S. military authorities ruled the island and made substantial changes in the Puerto Rican political system. They replaced the parliamentary form of government with a nominal separation of powers in three branches, along American lines, but with preponderant power in an executive appointed by the president. They reorganized the judiciary, laid the foundation for the separation of church and state, and established a public school system modeled on that of the United States.⁹¹

The Foraker Act replaced the military government with a civil government, which affirmed and extended the basic changes made by the military authorities. The power given to the U.S. president was almost caudillan in scope. The Act vested executive authority in a governor and an eleven-member executive council, five of whom were to be Puerto Ricans. These twelve executive officials and all of the justices of the insular Supreme Court were to be appointed by the U.S. president. Since the executive council also constituted the upper house of the Puerto Rican legislature, the president's power of appointment also extended to the legislative branch.⁹² The Puerto Ricans were enfranchised to elect the thirty-five members of the lower house of the legislature⁹³ and also a resident commissioner who could speak for them (but not vote) in the U.S. Congress.⁹⁴ The Act reserved to Congress the right to annul any law passed by the Puerto Rican

85. *Id.* arts. 5, 41-42.

86. *Id.* art. 21.

87. *Id.* Additional Articles, art. 2.

88. Treaty of Peace between the United States & Spain, Dec. 10, 1898, 30 Stat. 1754.

89. *Id.* art. IX.

90. Foraker Act, Act of Apr. 12, 1900, ch. 191, 31 Stat. 77.

91. INST. FOR THE COMP. STUDY OF POL. SYS., PUERTO RICO ELECTION FACTBOOK 6 (1968) [hereinafter PUERTO RICO ELECTION FACTBOOK].

92. Foraker Act §§ 17-18, 33.

93. *Id.* § 29.

94. *Id.* § 39.

legislature.⁹⁵ It also declared that all federal legislation, except internal revenue laws and other measures “not locally inapplicable,” would have the same force and effect in Puerto Rico as in the United States.⁹⁶

Though politically restrictive, the Act of 1900 did confer economic benefits on the island. Free trade was established with the mainland, Puerto Ricans were exempted from paying federal taxes, and federal excise taxes collected on the importation of Puerto Rican rum and tobacco were turned over to the Puerto Rican treasury.⁹⁷ In the meanwhile, political leaders like Muñoz Rivera and de Diego (primarily an *independentista*) led the struggle for greater autonomy and more self-government. Congress responded in 1917 by passing the Jones Act,⁹⁸ a slight liberalization of the existing law.

The Jones Act promulgated a bill of rights for the island, and provided that the upper house of the legislature was to be elected, and that all of the department heads were to be appointed by the governor with the advice and consent of the Puerto Rican Senate. The president would still have the power to appoint the attorney general, the Commission of Education, the auditor, and all justices of the Puerto Rican Supreme Court.

The most significant change was the granting of U.S. citizenship to Puerto Ricans. This provision was opposed by leaders of the Union of Puerto Rico, the dominant party at that time, on the grounds that the grant of U.S. citizenship would jeopardize their chances of obtaining their ultimate aspiration, “nationalism with or without an American protectorate.”⁹⁹ It is probably difficult for people in a powerful ethnocentric state who are enraptured with their own national symbol to entertain the notion that other people do not want that symbol. To be sure, some Puerto Ricans lobbied for citizenship. In any case, the opposition of the Union Party did not succeed in dissuading Congress from conferring U.S. citizenship on Puerto Ricans with all its attendant rights and duties.¹⁰⁰ Puerto Ricans became subject to the draft,¹⁰¹ but also became beneficiaries of the fundamental guarantees of the U.S. Constitution.¹⁰²

5. Development of the Puerto Rican Political Economy

Until about 1940, agriculture was the primary and almost exclusive economic activity; the accompanying political structure was almost feudal.¹⁰³ Sugar, tobacco, and coffee were the primary crops, in that order of importance.¹⁰⁴ In the first two decades of this century, substantial American capital was invested in Puerto Rico, particularly in the sugar industry.

95. *Id.* § 31.

96. *Id.* § 14.

97. PUERTO RICO ELECTION FACTBOOK, *supra* note 91, at 6. The federal taxation question has persisted as a companion issue to any discussion of the political status of Puerto Rico within the United States.

98. Act of Mar. 2, 1917, Pub. L. No. 368, ch. 145, 39 Stat. 951 (codified at 48 U.S.C. § 794 (2000)).

99. MALDONADO-DENIS, *supra* note 63, at 107.

100. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 145–46 (1989); *see* Leibowitz, *supra* note 57, at 244–45 (detailing the citizenship rights and responsibilities conferred upon Puerto Ricans).

101. MALDONADO-DENIS, *supra* note 63, at 108 (noting that months after passage of the Jones Act, President Woodrow Wilson ordered the registration and recruitment of Puerto Rican residents for the U.S. armed forces).

102. *See* Balzac v. People of Porto Rico, 258 U.S. 298, 312–13 (1922). As will be discussed below, the scope of these “fundamental” guarantees has been debated in subsequent adjudication. *See* discussion *infra* Part III.B.7.

103. RITA M. MALDONADO, *THE ROLE OF THE FINANCIAL SECTOR IN THE ECONOMIC DEVELOPMENT OF PUERTO RICO* 18–21 (1970).

104. *Id.* at 23.

Most profits were repatriated to the United States, and the seasonal nature of employment and low wages maintained conditions of instability.

The pattern of capital investment and profit repatriation was reversed during the New Deal. Between 1929 and 1933, Puerto Rico had undergone almost unbelievable calamities. Public funds, started by the Puerto Rican Emergency Relief Administration in 1933 and later continued by many other federal agencies, amounted to \$230 million by 1946.¹⁰⁵ These involved public works construction, food distribution, agricultural subsidies, loans to farmers and businessmen, and so on. Federal programs began to wind down by the end of the 1930s. A series of new programs aimed at development were then begun by Rexford Tugwell, the last mainland-appointed governor of the island, and Muñoz-Marín, who had become president of the Senate.¹⁰⁶

A number of development agencies were created, the most important of which was the Puerto Rico Industrial Development Company or PRIDCO (called the Economic Development Administration or EDA after 1950).¹⁰⁷ In 1947, PRIDCO began to encourage foreign investment, sold its own holdings, and became a promotional agency.¹⁰⁸ From 1948 to 1967, 1406 firms were promoted, 69% of them foreign.¹⁰⁹ National income increased fourfold (\$407 million to \$2163 million), while employment increased by 28%.¹¹⁰ As with earlier in the century, increases in national income and employment were offset by corresponding population growth. Nevertheless, Puerto Rican economic growth rates during this period compared favorably with those of other developing countries. This can be attributed to factors including:

- (i) a duty-free customs union with the United States;
- (ii) no federal income tax;
- (iii) local tax exemptions for eligible direct investments;
- (iv) use of the dollar as currency and hence, during the period under survey, no repatriation or convertibility problems;
- (v) political stability through association with the United States;
- (vi) federal government expenditures in grants, disbursements, and transfer payments; and
- (vii) cheap recruitment of funds in U.S. capital markets because Puerto Rican bonds are exempt from federal income tax.¹¹¹

In addition to these factors, a complex of financial and planning institutions contributed greatly to the development.

There have also been a number of failures in economic development and a number of dysdevelopments. According to U.S. government estimates for the year 2000, Puerto Rico had an unemployment rate of 9.5% out of a labor force of 1.3 million people.¹¹² From 1940 to 1972, population increased from about 1.8 million to 2.8 million, and it now exceeds 3.9

105. *Id.* at 24.

106. *Id.*

107. *Id.* at 25.

108. *Id.* at 26.

109. MALDONADO, *supra* note 103, at 27.

110. *Id.* at 28 tbl.3.3.

111. *Id.* at 31–33.

112. World Factbook I, *supra* note 55. *But c.f.* U.S. Bureau of the Census, *Statistics for Outlying Areas* tbl.1315 (reporting an unemployment rate of 14% for 1995), available at <http://www.census.gov/prod/2/gen/96statab/outlying.pdf> (last visited Oct. 29, 2003).

million by some estimates.¹¹³ Another problem is continuing dependence on foreign capital, which became inevitable when PRIDCO shifted to promoting private enterprise in the 1940s. Inflation is another serious problem, at times running twice as much as the general rate in the United States.¹¹⁴ Finally, foreign investment's repatriation of profits rather than reinvestment locally continues to deprive Puerto Rico of significant generation of local capital.¹¹⁵

6. Toward a Commonwealth Arrangement

The Unionist Party and other groups continued the fight for autonomous status, but it was not until 1947 that the first major amendment to the Jones Act was adopted. In that year Congress passed Public Law 362, which provided for an elective governor.¹¹⁶ Some Puerto Rican groups advocating both autonomy and independence continued to press Congress for a constitution and government of their own drafting. In 1950, the resident commissioner for Puerto Rico, in fulfillment of his campaign promise, introduced a bill in Congress, H.R. 7674, which provided for the organization of a constitutional government by the people of Puerto Rico. In 1950 Congress passed the bill as Public Law 600,¹¹⁷ which stated: "[f]ully recognizing the principle of government by consent . . . the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."¹¹⁸ The law was adopted "in the nature of a compact."¹¹⁹ Public Law 600 provided that the constitution would become effective only after it was approved by a Puerto Rican referendum.¹²⁰

The only substantive requirements with respect to the content of the proposed constitution imposed by the Act were that it provide for a republican form of government and include a bill of rights. The Act further provided that when the constitution of Puerto Rico became effective, there would be an automatic repeal of a large number of sections of the Jones Act of 1917, as amended (the pre-existing Organic Act).¹²¹ The repealed sections related primarily to matters of purely local concern including the structure of the insular government. The remaining sections were continued in effect and were renamed the Puerto Rican Federal Relations Act (PRFRA).¹²² The PRFRA today is the major source of

113. World Factbook I, *supra* note 55 (July 2001 estimate).

114. For 2000, the Puerto Rican inflation rate was 5.7%, compared to 3.4% in the United States. *Id.*; CIA, The World Factbook (2001), *Economy of United States*, available at <http://www.traveljournals.net/countries/economy.asp?c=us> (last visited Oct. 29, 2003).

115. See MALDONADO, *supra* note 103, at 36–38. PRIDCO, the Puerto Rico Industrial Development Company, is currently advocating reforms to the U.S. Internal Revenue Code to provide further incentives for investment in Puerto Rico. Sheryl Fred, *Big Spender: Puerto Rico Outdoes Mainland States in Federal Lobbying Efforts*, P.R. HERALD, Apr. 10, 2003, available at <http://www.puertorico-herald.org/issues/2003/vol7n17/BigSpender-en.shtml> (last visited Oct. 29, 2003). However, these incentives include tax benefits for reinvesting earnings in the United States, as well as in Puerto Rico. *Federal Incentives Imperative to Island's Economic Growth*, BANKING & FIN., available at http://www.internationalreports.com/theamericas/01/puerto%20rico/banking_finance%20 (last visited Oct. 29, 2003).

116. Act of Aug. 5, 1947, Pub. L. No. 362, ch. 490, 61 Stat. 770.

117. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. § 731 (2000)).

118. 48 U.S.C. § 731b.

119. Act of July 3, 1950, 64 Stat. at 319.

120. 48 U.S.C. § 731c.

121. 48 U.S.C. § 732.

122. Public Law 600 had rescinded most of the internal government provisions of the Jones Act (as amended in 1947) but kept in effect the economic relations between Puerto Rico and the United States that had remained unchanged since 1900. PUERTO RICO ELECTION FACTBOOK, *supra* note 91, at 8. The unrepealed sections of the

authority with respect to relations between Puerto Rico and the U.S. federal government, and will be discussed in more detail below. Though the name conveys a considered and coherent complex of norms, PRFRA is actually a melange of enactments since the turn of the century that have survived.

In 1951, 65% of the qualified voters participated in the referendum, and 76.5% of those voting approved Public Law 600.¹²³ Delegates were then elected to a constitutional convention; a document was drafted and submitted to the people in a second referendum. In this referendum, 59% of the qualified voters participated,¹²⁴ and 81.9% supported adoption of the Constitution.¹²⁵ By Public Law 447,¹²⁶ Congress and the president approved the Puerto Rican Constitution subject to the condition that three changes be made in the text:

- (1) the following sentence be added to Art. VII: "Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact";¹²⁷
- (2) that a provision patterned after the Universal Declaration of Human Rights recognizing the right to work, obtain an adequate standard of living and social protection in old age or sickness be deleted; and
- (3) that a provision assuring continuance of private elementary schools be added.¹²⁸

All three of these changes were made and approved by the Puerto Rican Constitutional Convention and later by another referendum.

The federal-commonwealth power allocation embodied in the Puerto Rican Constitution, as with any innovative social document, left many questions of international and constitutional law unanswered. What was clear beyond doubt was that a significant change in the Puerto Rico-United States relationship was taking place, despite the curious fact that many members of Congress seemed to believe that their legislative exercise did not alter the basic relationship.¹²⁹ Under the 1952 Constitution, Puerto Rico elects its own

earlier legislation became known officially as the Puerto Rican Federal Relations Act. 48 U.S.C. § 731e; PUERTO RICO ELECTION FACTBOOK, *supra* note 91, at 8.

123. PUERTO RICO ELECTION FACTBOOK, *supra* note 91, at 8. All elections and referenda held in Puerto Rico were on the basis of universal adult suffrage without a literacy requirement. *Id.* at 13.

124. *Id.* at 15.

125. Commonwealth Elections Commission of Puerto Rico Information Network, *Escrutinio del Referéndum del 3 de marzo de 1952 para la Aceptación o Rechazo de la Constitución Aprobada por la Convención Constituyente*, available at <http://electionspuertorico.org/archivo/proceso.constituyente/1952.html> (last visited Oct. 29, 2003).

126. H.J. Res. 430, 82d Cong., 66 Stat. 327 (1952).

127. *Id.*

128. *Id.*

129. Even in 1998, Congress found that

[t]he approved constitution established the structure for constitutional government in respect of internal affairs without altering Puerto Rico's fundamental political, social, and economic relationship with the United States and without restricting the authority of Congress under the Territorial Clause to determine the application of Federal law to Puerto Rico, resulting in the present "Commonwealth" structure for local self-government. The Commonwealth remains an unincorporated territory and does not have the status of "free association" with the United States as that status is defined under United States law or international practice.

governor and legislature; appoints all judges, all cabinet officials, and all other lesser officials in its executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code. All this is done without participation by, concurrence of, or even information submitted to, any federal officials. According to the 1966 United States-Puerto Rico Commission on the Status of Puerto Rico, “[n]o one in the Puerto Rican or Federal Government, either in the legislative or executive branch, has indicated that these conditions should change and that what has in fact occurred should not continue to be the situation.”¹³⁰

The Constitution of the Commonwealth provides that “[i]ts political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.”¹³¹ The Constitution establishes a tripartite form of government: an executive, a popularly elected bicameral legislature, and a judicial branch. The heads of all executive departments are appointed by the governor, with the advice and consent of the Puerto Rican Senate. With the establishment of the Commonwealth, neither the U.S. president nor the U.S. Senate participates in any way in the appointment of any official of the government of the Commonwealth.¹³²

The Legislative Assembly, “elected by free, universal and secret suffrage of the people of Puerto Rico, has full legislative authority in respect to local matters.”¹³³ The U.S. president “may no longer prevent a bill which has been repassed over the Governor’s veto from becoming law by disapproving it.”¹³⁴

The commonwealth arrangement also enforces significant ties to the United States. All Puerto Rican public officials must take an oath to support the Constitution of the United States and the Constitution and laws of the Commonwealth.¹³⁵ Amendments to the Puerto Rican Constitution must be consistent with the resolution (Act of July 3, 1952) approving the Constitution, with the applicable provisions of the federal Constitution, with the Puerto Rican Federal Relations Act, and with the Act of Congress authorizing the drafting and adoption of a Constitution.¹³⁶

Under the Puerto Rican Federal Relations Act, Puerto Rico has free trade with the United States, only U.S. currency is legal tender in Puerto Rico, and the statutory laws of the United States not locally inapplicable will, with some exceptions, have the same force and effect in Puerto Rico as in the United States.

Judgments of the Supreme Court of Puerto Rico may be appealed to the Supreme Court of the United States, but decisions of the U.S. Supreme Court have established that the Supreme Court of Puerto Rico is the final authority on the meaning of a Puerto Rican law, and that its decision interpreting such a law may not be reversed unless the interpretation is “inescapably wrong” and the decision “patently erroneous.”¹³⁷ It is not sufficient to justify reversal that the federal court merely disagree with the Puerto Rican Supreme Court’s interpretation.¹³⁸ There continues to be a U.S. District Court for the

United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 2(4) (1998).

130. STATUS OF PUERTO RICO: REPORT OF THE UNITED STATES-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO 37 (Arno Press Inc. 1975) (1966).

131. P.R. CONST. art. I, § 1.

132. Monclova, *supra* note 76, at 37.

133. 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 395 (1963).

134. *Id.*

135. P.R. CONST. art. VI, § 16.

136. *Id.* art. VII, § 3.

137. Bonet v. Tex. Co., 308 U.S. 463, 471 (1940).

138. *Id.* at 471.

District of Puerto Rico. It is a legislative court,¹³⁹ but its jurisdiction does not now differ from the jurisdiction of federal district courts functioning within the boundaries of U.S. states.¹⁴⁰

The people of Puerto Rico continue to be citizens of the United States as well as of Puerto Rico, and the fundamental provisions of the U.S. Constitution continue to be applicable to Puerto Rico. Puerto Rico continues to be represented in the House of Representatives by a resident commissioner whose functions were not altered by the establishment of the Commonwealth, and the governor maintains an office in Washington, D.C. Matters of foreign relations and defense, though not mentioned explicitly, are conducted by the United States.

7. The Legal Relationship of Puerto Rico to the United States Under American Law

The formal contours of the legal relationship of Puerto Rico to the United States are determined by the Constitution of the Commonwealth of Puerto Rico, the Puerto Rican Federal Relations Act, the U.S. Constitution, and Public Law 600.

Prior to the 1950–1952 legislation authorizing the establishment of the Commonwealth, Puerto Rico was a territory of the United States and was governed pursuant to the territorial clause and the inherent powers of the national government to acquire territory.¹⁴¹ When the constitution drafted by the convention was submitted to Congress for approval, Congress approved it subject to the three conditions mentioned earlier. The only condition of major and continuing structural importance was the requirement that the article of the constitution establishing the procedure for amending the constitution be changed to include the following sentence:

[a]ny amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.¹⁴²

The PRFRA authorizes a wide but ambiguous area in which the federal government could intervene in Puerto Rican internal affairs. Section 9 of that act provides “[t]hat the statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws”¹⁴³ Thus, Congress appears to have reserved the power, without future amendment of the PRFRA, to enact general legislation applicable to Puerto Rico as well as to the rest of the United States. There seems to be no express commitment by Congress that it will extend the provisions of such legislation only after consultation and manifestation of consent by the people of Puerto Rico.¹⁴⁴

139. See Kenneth L. Karst, *Legislative Court*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1144 (1986) (citing Puerto Rico as an example of a legislative court).

140. See 28 U.S.C. § 119 (2000) (establishing the District Court of Puerto Rico).

141. U.S. CONST. art. IV, § 3, cl. 2; *Am. Ins. Co. v. Canter*, 26 U.S. 511, 542 (1828).

142. H.R.J. Res. 430, 82d Cong. (1952), *subsequently adopted in* P.R. CONST. art. VII, § 3.

143. Act of Mar. 2, 1917, 39 Stat. at 954; *see also* 48 U.S.C. § 734 (2001) (extending some internal revenue laws to Puerto Rico without repealing Section 9 of the PRFRA); CONSTITUTIONAL HISTORY, *supra* note 71, at 160 (providing the version of the PRFRA referred to in Section 4 of Pub. L. No. 600).

144. With respect to those who claim that the compact between the United States and Puerto Rico included both the Commonwealth Constitution and the PRFRA and therefore Congress may not alter or amend the PRFRA

From the standpoint of effective Puerto Rican autonomy, the great problem with Section 9 is not its existence, but the absence of institutional arrangements for testing its range of applicability. It also remains unclear which U.S. laws apply to Puerto Rico. In 1978, the U.S. Supreme Court ruled in *Califano v. Torres* that Congress could provide lower Social Security benefits to the elderly and disabled living in Puerto Rico.¹⁴⁵ Two years later, in *Harris v. Rosario*, the Court held that Congress could provide lesser benefits to Puerto Rico residents under the Federal Aid to Families with Dependent Children program.¹⁴⁶ The *per curiam* opinion states that Congress “may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”¹⁴⁷ Nevertheless, there is some indication that the U.S. Court of Appeals for the First Circuit, which has appellate jurisdiction over federal cases from Puerto Rico, is inclined to set a higher bar for Equal Protection review. The court explained:

Thus, in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.¹⁴⁸

In this case, the Circuit Court rejected the idea that Congress can legislate for Puerto Rico under the Territory Clause.¹⁴⁹ Instead, it upheld wiretapping provisions of the Federal Omnibus Crime Control Act that conflicted with the Puerto Rican Constitution on the theory that Congress can legislate for Puerto Rico on matters of national importance, as it does for the states.¹⁵⁰

As amended, the PRFRA today includes the following additional provisions:

unilaterally, it is interesting to note that Congress unilaterally repealed a provision of the Act by enacting the Act of June 2, 1970, Pub. L. No. 91-272, § 13, 84 Stat. 294, 298. This Act repealed the section of the PRFRA, formerly 48 U.S.C. § 863, under which the U.S. District Court for the District of Puerto Rico exercised the so-called territorial jurisdiction. Similarly, the Act of Mar. 2, 1917, 39 Stat. at 966, setting out qualifications for jurors, was repealed unilaterally by the Act of Mar. 27, 1968, Pub. L. No. 90-274, § 103(g), 82 Stat. 53, 63. However, Congress has also conditioned the repeal of another section of the PRFRA with the provision that the repeal would take effect only after a Puerto Rican referendum approving the inclusion of the substance of the section in an amendment to the Commonwealth Constitution. For example, the Act of Aug. 3, 1961, Pub. L. No. 87-121, 75 Stat. 245, eliminated the limitation on Puerto Rican public indebtedness, found in the PRFRA, only upon adoption of an amendment to the Constitution of the Commonwealth of Puerto Rico providing for a similar limitation on public indebtedness.

145. *Califano v. Torres*, 435 U.S. 1, 4 (1978).

146. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980).

147. *Id.* at 651–52; Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 477 (1992).

148. *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (referring to *Mora v. Mejias*, 206 F.2d 377, 386–88 (1st Cir. 1953) (questioning whether Puerto Rico should be deemed a state, and therefore “sovereign over matters not ruled by the Constitution,” or a territory, and therefore subject to Congressional regulation)); Van Dyke, *supra* note 147, at 478. Section 11 of the PRFRA also opened the door for future intervention by the Congress or the executive in Puerto Rican internal affairs. It required the governor and heads of departments to make all reports “required by law” to any U.S. official of an executive department of the U.S. government, to be designated by the president, which would have jurisdiction over all matters pertaining to the government of Puerto Rico. Act of Mar. 2, 1917, 39 Stat. at 955. This provision is defunct, for no laws now require notification. See also 48 U.S.C.A. § 821 n.1 (2003) (citing cases concerning conflicting federal laws).

149. *Quinones*, 758 F.2d at 42.

150. *Id.* at 43.

A. Provisions relating to Puerto Rican economic interests and external commercial relations include:

1. elimination of tariffs on trade between Puerto Rico and the United States;¹⁵¹
2. provision of equal tariffs for Puerto Rico and the United States on all items except for coffee imported from abroad;¹⁵²
3. exception from the internal revenue laws;¹⁵³
4. exemption from export duties levied on exports from Puerto Rico;¹⁵⁴
5. requirement that funds collected on exports—excise taxes—transported from Puerto Rico to the United States and customs duties collected in Puerto Rico on foreign imports be returned to the Puerto Rico treasury;¹⁵⁵ and
6. exemption from federal taxation of bonds issued by the government of Puerto Rico.¹⁵⁶

B. Provisions relating to the federal-insular sharing of power include:

1. harbors, navigable streams, bodies of water, and submerged land around Puerto Rico, not used by the United States for public purposes, are to be under the control of Puerto Rico;¹⁵⁷
2. citizens of Puerto Rico are to be citizens of the United States with unrestricted freedom to migrate to the United States with full citizenship rights;¹⁵⁸
3. a resident commissioner with no vote sits in the United States House of Representatives;¹⁵⁹ and
4. Puerto Rico is exempted from the Interstate Commerce Act, the Safety Act, and the Safety Appliance Acts.¹⁶⁰

The power of the Puerto Rican people to amend their Constitution is also limited by the requirement that such amendment be consistent with the “applicable provisions of the Constitution of the United States.”¹⁶¹ What provisions of the U.S. Constitution are considered applicable has varied over time with the expansion and contraction of the doctrine of incorporated versus unincorporated territories. Originally Puerto Rico was considered an unincorporated territory, and under this doctrine only “fundamental” provisions of the Constitution applied to Puerto Rico.¹⁶² The uniformity clause, the Fifth

151. 48 U.S.C. § 738.

152. *Id.* § 739; 19 U.S.C. §§ 1319, 1319a. Sections 738–39 of 48 U.S.C., originally enacted by the Foraker Act, 31 Stat. 77, were not enacted into the PRFRA per se (under 48 U.S.C. § 731(e) or Act of July 3, 1950, 64 Stat. 319), but remain in the current code.

153. 48 U.S.C. § 734.

154. *Id.* § 741.

155. *Id.* §§ 734, 740.

156. *Id.* § 745.

157. *Id.* § 749.

158. *Id.* § 733.

159. 48 U.S.C. § 891.

160. *Id.* § 751.

161. P.R. CONST. art. VII, § 3.

162. Leibowitz, *supra* note 57, at 241.

Amendment requirement of indictment by grand jury, and the Sixth Amendment requirement of trial by jury were held not to apply to Puerto Rico.¹⁶³ Due process was the only constitutional requirement that has been specifically applied to Puerto Rico, but “whether this is under the fifth amendment or fourteenth amendment is unclear.”¹⁶⁴

When Puerto Rico achieved commonwealth status, it seemed logical that the constitutional exceptions that it had previously enjoyed under the doctrine of unincorporated territory would continue, especially since Public Law 600 and the PRFRA did not mention specific U.S. constitutional provisions.¹⁶⁵ However, in 1957 the Supreme Court specifically expressed its desire that this doctrine not be given “any further expansion.”¹⁶⁶ Nevertheless, in 1959 the doctrine was applied by a circuit court to Puerto Rico.¹⁶⁷ As noted above, more recent decisions suggest that the question of what provisions of the U.S. Constitution, and what federal programs and legislation, are applicable to Puerto Rico will continue to be determined on a case-by-case basis.

8. Foreign Affairs

What is the allocation of foreign affairs competence between the United States and Puerto Rico? The Constitution of Puerto Rico does not mention this matter. One encounters particular difficulties in construing statements made in the course of the formulation of the Commonwealth, for there is a pervasive assumption of a sharp distinction between internal affairs and international affairs. But the distinction is only a shadow cast by one’s standpoint. In an interdependent world, the clarification and implementation of “internal” policies regularly involve mobilizations of many components of the world political process. At a certain point of interdependence, internal “autonomy” becomes meaningless if one is prevented from making it effective by looking to the resources of the more inclusive world community. Experience suggests that independence can be more effectively enjoyed by learning to operate within and derive benefits from an ineluctably interdependent environment.

Against this backdrop of concerns for independence and viability, discussions at the constitutional phase were plainly aimed at accommodating a variety of divergent interests. The strains were most obvious in the well-known “Resolution 22” of the Constitutional Convention in 1952; it was concerned with finding a name for the new political organization of Puerto Rico, and its search produced, *inter alia*, the following representative oddity:

Whereas, the word “commonwealth” in contemporary English usage means a politically organized community, that is to say, a state (using the word in the generic sense) in which political power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or other type of association and therefore does not have independent and separate existence;

163. *Id.* at 242. The classic cases are *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (finding the Foraker Act constitutional) and *Balzac*, 258 U.S. at 304–05 (holding the Sixth Amendment right to a jury trial inapplicable to Puerto Rico as an unincorporated territory).

164. Leibowitz, *supra* note 57, at 242. Recently, in *Cruz v. Melecio*, 204 F.3d 14, 18 n.2 (1st Cir. 2000), the U.S. Court of Appeals for the First Circuit observed that Puerto Rico is the “functional equivalent of a state” for full faith and credit purposes.

165. Leibowitz, *supra* note 57, at 240.

166. *Reid v. Covert*, 354 U.S. 1, 14 (1957).

167. *Fournier v. Gonzalez*, 269 F.2d 26, 28–29 (1st Cir. 1959).

Whereas, the single word “commonwealth”, as currently used, clearly defines the status of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States . . .

Whereas, there is no single word in the Spanish language exactly equivalent to the English word “commonwealth” . . .

Whereas, in the case of Puerto Rico the most appropriate translation of “commonwealth” into Spanish is the expression of “estado libre asociado”, which however should not be rendered “associated free state” in English inasmuch as the word “state” in ordinary speech in the United States means one of the States of the Union . . .¹⁶⁸

This incredible tissue of legalisms, fictions, metaphysical abstractions and ad hoc definitions masquerading as “usages” provides no guidelines for determining through time the allocation of the bundle of competences, which we habitually refer to as foreign affairs powers; that, of course, is the operational problem. Nor are analogies to states of the Union helpful, for Puerto Rico is not a state.¹⁶⁹ Even as between states and the federal government, the actual allocation of competence in foreign affairs matters is more complex than the black-letter of Article I, Section 10 of the Constitution.¹⁷⁰ Judge Story suggested a distinction between treaties of critical national concern and agreements of primarily local interest;¹⁷¹ this division may explain the apparent disparity in subsequent practice. Professor Henkin summarizes:

Whether by so narrowing the constitutional requirement of Congressional consent, or because consent was assumed, state and local authorities have in fact entered into agreements and arrangements with foreign counterparts without seeking consent of Congress, principally on matters of common local interest such as the coordination of roads, police cooperation, and border control. The State and the City of New York have arrangements with the United Nations about the UN Headquarters and its personnel, and with permanent missions to the UN of various foreign governments. An interstate compact to facilitate the interpleader of other parties to judicial proceedings, which contemplates adherence by foreign governments and their component units, also appears not to have obtained the consent of Congress.¹⁷²

168. CONSTITUTIONAL HISTORY, *supra* note 71, at 164. This resolution was approved by the Constitutional Convention of Puerto Rico on Feb. 4, 1952. *Id.* But cf. José A. Cabranes, *The Evolution of the “American Empire”*, 67 AM. SOC’Y INT’L L. PROC. 1, 2 (1973) (arguing that “‘Free Associated State’ is a preferable term, in both Spanish and English, because it is less ambiguous than the word ‘Commonwealth’ and properly suggests the essential attributes of Puerto Rico’s current political status”).

169. See, e.g., *Mora v. Torres*, 113 F. Supp. 309 (D.C.P.R. 1953), *aff’d*, 206 F.2d 377 (1st Cir. 1953).

170. In a telephone conversation with Assistant Legal Advisor Marjorie M. Whiteman, Resident Commissioner Antonio Fernós-Isern stated that foreign relations powers of Puerto Rico “belong completely to the Federal Government.” Memorandum from the Office of Inter-American Regional Political Affairs (Mar. 12, 1962), in 1 WHITEMAN, *supra* note 133, at 400. If this is indeed so, then Puerto Rico has less foreign affairs competence than a state of the Union and no indirect input through congressional processes. This informal comment of Commissioner Fernós-Isern does not seem to be a particularly authoritative statement of policy or practice.

171. 2 JOSEPH STORY, COMMENTARIES §§ 1396–97 (1884).

172. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 233 (1972) (citations omitted); see also Raymond Spencer Rogers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT’L L. 1021, 1023–28 (1969) (discussing examples of agreements between states and foreign governments without the consent of Congress).

In effect a complex code is emerging in response to the increased interdependencies of life on this planet. Even local governments can no longer exist in isolation; international concerns attend some of the most mundane public functions. Where these activities do not affect national policies, their unsupervised exercise by components of the federal system is increasingly deemed lawful. In short, two legal categories emerge with increasing clarity. The first includes matters which require exclusive federal competence; the second includes matters which do not have such egregious impacts as to require exclusive federal competence. In the tradition of American decentralization, these matters are left to state and local governments and, by implication and in practice, to the government of the Commonwealth.

9. The Legal Status of Puerto Rico Under International Law

The final declaration of the Constitutional Convention of Puerto Rico (Resolution 23) stated:

When this Constitution takes effect, the people of Puerto Rico shall thereupon be organized in a commonwealth established within the terms of the compact entered into by mutual consent, which is the basis of our union with the United States of America Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization¹⁷³

In a letter to the president of the United States, dated January 17, 1953, Luis Muñoz-Marín, the governor of the Commonwealth, indicated his understanding of what had been achieved by the compact:

The laws enacted by the Government of the Commonwealth pursuant to the compact cannot be repealed or modified by external authority, and their effect and validity are subject to adjudication by the courts. Our status and the terms of our association with the United States cannot be changed without our full consent.¹⁷⁴

Later that year U.S. Ambassador to the United Nations Henry Cabot Lodge, Jr. conveyed a message to the General Assembly from President Eisenhower:

I am authorized to say on behalf of the President that, if at any time the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted. The President also wishes me to say that in this event he would welcome Puerto Rico's adherence to the Rio Pact and the United Nations Charter.¹⁷⁵

173. CONSTITUTIONAL HISTORY, *supra* note 71, at 166–67. The Resolution was approved by the Constitutional Convention on Feb. 4, 1952. *Id.* at 166.

174. Luis Muñoz Marín, *The Governor of Puerto Rico to the President of the United States*, DEP'T ST. BULL., Apr. 1953, at 589; 1 WHITEMAN, *supra* note 133, at 400.

175. Henry Cabot Lodge, Jr., *U.S. Relationship with Puerto Rico*, Nov. 27, 1953, DEP'T ST. BULL., Dec. 1953, at 841; 1 WHITEMAN, *supra* note 133, at 400.

In the remainder of the message the United States advised the United Nations that it would no longer report with respect to Puerto Rico under Article 73(e) since Puerto Rico was now fully self-governing.

A statement by Congresswoman Frances P. Bolton, U.S. representative in the Fourth Committee of the General Assembly, described the new relationship between the United States and Puerto Rico as follows:

The previous status of Puerto Rico was that of a territory subject to the full authority of the Congress of the United States in all governmental matters. The previous constitution of Puerto Rico was in fact a law of the Congress of the United States, which we called an organic act. Only Congress could amend the organic act of Puerto Rico. The present status of Puerto Rico is that of a people with a constitution of their own adoption, stemming from their own authority which only they can alter or amend. The relationships previously established also by a law of the Congress [that is, by the Puerto Rican Federal Relations Act], which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.¹⁷⁶

The U.N. General Assembly's response to the U.S. action was expressed in the adoption of Resolution 748 (VIII), which recognized that:

2. . . . the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status
4. . . . when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination;
5. . . . in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity¹⁷⁷

There is no indication that the Puerto Rican vote was corrupted or that an associated status was not the preference of a majority of the voters in the referendum. There were, nonetheless, apparent flaws in the procedure, though contemporary General Assembly approval indicates they were not deemed material at the time. The flaws included, among other things, the fact that there was no U.N. supervision of the referendum, that acceptance of the Puerto Rican constitution required U.S. congressional approval as well as Puerto Rican acceptance, and that future changes in Puerto Rico's status would require U.S. assent.¹⁷⁸

The debate over political status did not end with the achievement of commonwealth status or with the U.N. resolution declaring that Puerto Rico was now fully self-governing.

176. Frances P. Bolton, *Nov. 3 Statement by Mrs. Bolton*, DEP'T ST. BULL., Dec. 1953, at 804; see also I WHITEMAN, *supra* note 133, at 400 (stating that the laws enacted by Puerto Rico and Puerto Rico's association with the United States cannot be altered without Puerto Rico's consent).

177. G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A/2630 (1953).

178. We would submit that the principal's conditions for association would become unlawful only if (a) they were de facto coercive in that the putative associate could not refuse association, and (b) they deviated sharply from social and political demands in the associate.

When commonwealth status was first adopted, many Puerto Ricans perceived it as a transitional phase, a postponement of a permanent decision on status. Some who favored commonwealth wanted time for Puerto Rico to develop economically before it decided on a final political destiny. However, many political leaders, like Governor Muñoz-Marín, for many manifest and latent reasons, began to feel that a self-governing but associated state would be the best political as well as economic solution. To those leaders, the commonwealth status came to be seen as permanent, and one which was capable of evolving to serve the needs of both parties to the compact. Other political factions continued to advocate independence or statehood as preferred alternatives.

Groups outside of Puerto Rico were also involved in the status debate. In 1960 the Soviet and Cuban delegations to the United Nations charged that commonwealth status was merely a disguised form of colonialism. Governor Muñoz's response was to send a message to the United Nations stating that:

Puerto Rico . . . has freely chosen its present relationship with the United States. The people of Puerto Rico are a self-governing people freely associated to the United States of America on the basis of mutual consent and respect. The policies regarding the cultural and economic development of Puerto Rico are in the hands of the people of Puerto Rico themselves for them to determine according to their best interests.¹⁷⁹

Muñoz also reported that by law of the Commonwealth of Puerto Rico, a vote on Puerto Rico's status was authorized whenever 10% of the voters requested it.¹⁸⁰

Continuing preoccupation with Puerto Rico's status was responsible for the formation of a Status Commission by the U.S. Congress, to be jointly appointed by the president and the governor of Puerto Rico. It led ultimately to another referendum in Puerto Rico on the future status of the island; a majority again voted for continuation of the commonwealth arrangement. In the United Nations, Cuba continued to press for assumption of the issue of Puerto Rico by the Committee of 24.¹⁸¹ In its 1972 session, the Committee adopted the following Resolution:

The Special Committee . . .

179. 1 WHITEMAN, *supra* note 133, at 403.

180. *Id.*

181. See, e.g., *Letter dated 9 February 1972 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the Special Committee*, U.N. GAOR Special Comm. on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/AC.109/392 (1972). In 1961, the General Assembly by Resolution 1810 (XVII) created a Special Committee to make recommendations regarding the implementation of Resolution 1514 (XV). G.A. Res. 1810, U.N. GAOR, 17th Sess., Supp. No. 17, at 72, U.N. Doc. A/5217 (1962). The committee, generally known now as the Committee of 24, heard claims on behalf of independence-minded groups intermittently. The Committee's attention has recently been focused on Puerto Rico as a result of the dispute over the U.S. military presence on the island of Vieques. The Committee adopted a resolution on June 21, 2001 "urging" the United States to halt military drills on the island of Vieques. Press Release, *Special Committee on Decolonization Adopts Resolution Urging United States To Halt Military Drills on Vieques Island, Puerto Rico*, U.N. GAOR Special Comm. on Decolonization, 6th mtg., U.N. Doc. GA/COL/3065 (June 21, 2001), available at <http://www.un.org/News/Press/docs/2001/gacol3053.doc.htm> (last visited Oct. 29, 2003); see also Press Release, *Acting Without Vote, Special Decolonization Committee Approves Text on Puerto Rico*, U.N. Doc. GA/COL/3036 (July 12, 2000), available at <http://www.un.org/News/Press/docs/2000/20000712.gacol3036.doc.html> (last visited Oct. 29, 2003).

Having considered the question of the list of Territories to which the Declaration is applicable,

Recognizing the inalienable right of the people of Puerto Rico to self-determination and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Instructs its Working Group to submit to it at an early date in 1973 a report relating specifically to the procedure to be followed by the Special Committee for the implementation of General Assembly resolution 1514 (XV) with respect to Puerto Rico.¹⁸²

A similar resolution was adopted in 1973. At least at the present, a majority of the world appears to ignore Puerto Rico, to view its situation as "acceptable," or to feel that whatever problem may exist there is benign. But it is an international issue in certain senses, and there does emerge from the record a certain set of international conceptions about Puerto Rico:

1. Under international law, the United Nations does view Puerto Rico as "distinct." The accommodation reached in 1953 underlined the fact that Puerto Rico was an international entity separate from the United States, whose association with the United States under the Compact formula was deemed an adequate acquittal of U.N. obligations because it was freely consented to by the Puerto Rican people.
2. Despite the Compact and the degree of integration in certain economic sectors, the United Nations continues to view Puerto Rico as a separate national entity. If, in 1953, the Puerto Rican people had voted without coercion for statehood and integration in the American federal system, this action would have extinguished Puerto Rico's international personality and would have been so recognized by the United Nations under the formula enunciated some years later in Resolution 1541(XV). An unfortunate precedent is the Assembly's endorsement of the West Irian *musjawarah* leading to incorporation into Indonesia.¹⁸³ In fact, Puerto Rico did not opt for integration and President Eisenhower took pains in his communication to the United Nations to underline the continued separate international existence of Puerto Rico and, with equivocation, its continued option to change the form of its association and, indeed, to opt for full independence if it should so desire.¹⁸⁴
3. The general response in the United Nations would appear to indicate that the effective elite and probably a majority of the membership views the commonwealth-association arrangement as an adequate arrangement under contemporary international standards.
4. The status of an association is never final. Because the content of the association arrangement is evolving and international standards change, the Puerto Rico question may be brought up at some later date if conditions or law so change that the relationship between Puerto Rico and the United States deviates from normative demands. Strangely, if not inconsistently, because there is a potential for abuse in a relationship which is factually unequal, U.N. approval of such an arrangement is never likely to be final. The General

182. U.N. GAOR, 27th Sess., Supp. No. 23, at 31, U.N. Doc. A/8723/Rev. 1 (1972).

183. For a review, see Chen & Reisman, *supra* note 21, at 663 & n.244.

184. See *supra* text accompanying note 125.

Assembly may subject anything in the world to appraisal and reappraisal, and it is even more likely to scrutinize association arrangements from time to time.

The 1990s saw two inconclusive political status referenda on the island; more may lie ahead. In the meantime, there are obvious imperfections in the association status of Puerto Rico, which will be invoked by critics. Some of the reserved congressional powers and some of the applications of Section 9 of the PRFRA raise questions with regard to General Assembly Resolution 1541(XV), and the relative absence of Puerto Rico as an actor in international politics is disquieting. But an appropriate measure of realism is necessary: human institutions can only approximate, but not duplicate, their ideal form. One does not dismiss the characterization of Puerto Rico as an association because there are some discrepancies from the norm any more than one dismisses the characterization of a nation-state as independent because it has delegated some competences to an international organization: formal discrepancies may be discounted if their substantive purpose has been achieved. Many of the 1541-type questions with regard to Puerto Rico in fact engage the complex of compromises and allocations that are the distinctive features of association.

10. Participation in the International Process

Puerto Rico participates in its own capacity in a number of international organizations: it has observer status in the Caribbean Community and Common Market (Caricom); associate membership in the Economic Commission for Latin America and the Caribbean, the Food and Agriculture Organization, and the World Health Organization; and membership in the International Federation of Christian Trade Unions, the International Olympic Committee, the World Confederation of Labor, and the World Federation of Trade Unions; it also participates in the International Criminal Police Organization (Interpol) at the sub-bureau level.¹⁸⁵ Puerto Rico has its own Department of State,¹⁸⁶ and a number of countries maintain diplomatic missions in Puerto Rico, facilitating direct contacts between Puerto Rican representatives and foreign officials.¹⁸⁷ In this manner, Puerto Rico is able to participate in international processes, and in particular to focus on issue-areas that it deems particularly pressing or relevant to its people, whether or not these mirror the priorities of the United States as a whole. Although its status in the international system falls well short of independent statehood, it enjoys an international personality distinguishable from, if largely bound up with, that of the United States.

IV. THE TRUST TERRITORY OF THE PACIFIC ISLANDS

A. *A Historical Overview*

The former Trust Territory of the Pacific Islands (TTPI) is made up of the Caroline Islands, the Marshall Islands, and the Northern Mariana Islands, which extend east of the Philippines and northeast of Indonesia in the North Pacific Ocean. The term "Micronesia" is used both to designate the entire region and to refer to the Caroline Islands in particular;

185. World Factbook I, *supra* note 55.

186. See Estado Libre Asociado de Puerto Rico, *Departamento de Estado*, at <http://www.estado.gobierno.pr> (last visited Oct. 29, 2003).

187. For a list of these consulates, see *Embajadas y Consulados en Puerto Rico*, at <http://www.geocities.com/TheTropics/9472/consulados.html> (last visited Oct. 29, 2003).

the Federated States of Micronesia comprise the Caroline Islands with the exception of its westernmost cluster, Palau. The first known Western contact with these islands was Magellan's journey around the world in 1521. Spain took little immediate interest in governing the islands; when it did extend its influence, its objectives were minimal. As described by one scholar, they were limited to "pacification and Christianization of the indigenes, maintenance of a way station for Spanish ships, and preservation, at the lowest possible cost, of orderly government."¹⁸⁸ Germany took control of the Marshall Islands in 1885 and purchased Spain's remaining holdings in Micronesia in 1899. The hallmark of German rule was the insistence on copra production and commerce through the forced planting of coconut trees.¹⁸⁹

Japanese naval forces occupied the area shortly after the outbreak of World War I. While Japan believed that the Carolines, the Marianas, and the Marshall Islands would become part of the Japanese Empire at the end of the war, Japan was instead given a Class C mandate by the League of Nations in 1920 to administer the islands.¹⁹⁰ In the 1930s, Japan began fortifying many of the islands in violation of the terms of its mandate; the task force that bombed Pearl Harbor was apparently supplied in Micronesia.¹⁹¹ The strategic importance of the islands was not lost on the United States. By the end of World War II, U.S. military forces had occupied most of the islands; the bombs dropped on Tokyo in 1944 and the atom bomb used against Hiroshima were delivered by U.S. planes based in the Marianas.¹⁹² Although sensitive to evolving international norms against imperialism, the United States was loath to give up its control of this territory, in particular out of concern that it could once again be used to launch enemy attacks. In 1947, the United Nations agreed to designate the area a "strategic trust territory" under the trusteeship of the United States, a unique arrangement that put the territory under the control of the Security Council and that allowed the trustee to use the territory for military purposes.¹⁹³

The decision to create a strategic trust was informed by a number of considerations. From the perspective of the United States, as elaborated by Warren R. Austin, the U.S. representative to the Security Council, the islands "constitute an integrated strategic physical complex vital to the security of the United States."¹⁹⁴ In fact, as stated by then-General Dwight Eisenhower:

[These islands] are of very little economic value. Our sole interest in them is security So long as we have them, [aggressive nations] can't use them, and that means to me, even in their negative denial to someone else, a tremendous step forward in the security of this country.¹⁹⁵

188. LEIBOWITZ, *supra* note 100, at 485.

189. *Id.*

190. *Id.* at 485–86; STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 39 (1995).

191. LAUGHLIN, *supra* note 190, at 39.

192. LEIBOWITZ, *supra* note 100, at 487.

193. Trusteeship Agreement for the Former Japanese Mandated Islands, U.N. SCOR, 2d Sess., 124th mtg. at 16 (1947) [hereinafter Trusteeship Agreement].

194. LEIBOWITZ, *supra* note 100, at 487 (quoting JAMES H. WEBB, JR., *MICRONESIA AND U.S. PACIFIC STRATEGY: A BLUEPRINT FOR THE 1980S* 79 (1974)); see also LAUGHLIN, *supra* note 190, at 462–63 ("[After World War II] [t]he military of the United States . . . having captured and liberated Micronesia at high cost in American lives, was not eager to leave the islands for someone else's military exploitation.").

195. *Joint Resolution Authorizing the President to Approve the Trusteeship Agreement for the Territory of the Pacific Islands: Hearings on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong. 18 (1947) (statement of Dwight D. Eisenhower, General of the Army).

The strategic imperative of excluding other powers was, and remains, the paramount consideration for the United States in its dealings with the TTPI. Given the postwar international climate of hostility toward territorial annexation, and the concern that U.S. acquisitions would fuel Soviet territorial ambitions in other parts of the world, the United States accepted a strategic trust that could be altered only with the approval of the Security Council, where the United States could exercise its veto.¹⁹⁶ The postwar trusteeship arrangement and the subsequent commonwealth and free association agreements negotiated with the islands illustrate the range of options that have been deemed to provide the United States with the required security guarantees alongside varying degrees of self-government for the islands' inhabitants.

The 1947 Trusteeship Agreement assigned the following duties to the United States as the administering authority to:

- (1) foster the development of political institutions and local participation in government;
- (2) promote the development of the inhabitants toward self-government or independence;
- (3) promote the economic self-sufficiency of the TTPI inhabitants and encourage fishing development, agriculture, and industry;
- (4) protect the inhabitants against the loss of their lands;
- (5) promote social advancement, protecting the rights and fundamental freedoms of all without discrimination; and
- (6) promote educational advancement.¹⁹⁷

The United States was also accorded the following entitlements, to be exercised for "the maintenance of international peace and security:"

1. [t]o establish naval, military and air bases and to erect fortifications in the Trust Territory;
2. [t]o station and employ armed forces in the Territory; and
3. [t]o make use of volunteer forces, facilities and assistance from the Trust Territory in carrying out the obligations towards the Security Council undertaken in this regard by the Administering Authority, as well as for the local defence and the maintenance of law and order within the Trust Territory.¹⁹⁸

At first, President Truman gave the Navy administrative responsibility for the islands.¹⁹⁹ During the 1950s, this responsibility was transferred back and forth between the Department of the Interior and the Secretary of the Navy, and ultimately ended up with the President himself.²⁰⁰ In 1962, President Kennedy redelegate his authority for civil

196. LEIBOWITZ, *supra* note 100, at 487–88; U.N. CHARTER art. 83(1).

197. LEIBOWITZ, *supra* note 100, at 488; Trusteeship Agreement, *supra* note 193, art. 6.

198. Trusteeship Agreement, *supra* note 193, art. 5.

199. Exec. Order No. 9875, 3 C.F.R. 658 (1943–1948).

200. *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 98 n.10 (9th Cir. 1974) (citing Exec. Order No. 10,265, 3 C.F.R. 766 (1949–1953); Exec. Order No. 10,408, 3 C.F.R. 906 (1949–1953); Exec. Order No. 10,470, 3 C.F.R. 951 (1949–1953); Act of June 30, 1954, Pub. L. No. 88-487, ch. 423, § 1, 68 Stat. 330 (codified as amended at 48 U.S.C. § 1681)).

administration of the entire Trust Territory to the Secretary of the Interior²⁰¹ who, in turn, delegated executive authority to the High Commissioner.²⁰² This authority covered the internal government of the TTPI, expenditure of federal funds in the TTPI, and responsibility for carrying out the international obligations of the United States.²⁰³

The United States divided the TTPI into six districts: Pohnpei (including Kosrae), Truk, and Yap (which together now form the Federated States of Micronesia); the Northern Mariana Islands; the Marshall Islands; and Palau.²⁰⁴ Each district had an administrator, a federal official reporting to the high commissioner. Political advisory bodies were established in each district to assist the district administrator in governing the area.²⁰⁵ As it turned out, these bodies were instrumental in creating a sense of identity and even nationalism in each district, but this collective feeling did not extend to the TTPI as a whole.²⁰⁶ Over time, the advisory committees acquired de facto legislative authority in their respective jurisdictions.²⁰⁷

During the 1960s, the Kennedy administration inaugurated a program of economic and social development in Micronesia and took steps to streamline the district legislatures.²⁰⁸ The Congress of Micronesia was chartered in 1965²⁰⁹ with the idea that the TTPI would determine its future political status collectively. In 1966, the Micronesian Congress petitioned President Johnson to establish a joint status commission to study available political alternatives. Instead, the president asked the U.S. Congress to appoint a presidential commission to consider the status question; the bill passed the Senate, but failed in the House Interior and Insular Affairs Committee.²¹⁰ The Micronesian Congress established its own status commission, and in September 1969, the United States began negotiations with the Micronesian Congress's Joint Committee on Future Status.²¹¹

It soon became apparent that the political aspirations of people in various districts were not uniform. In particular, the Marianas wanted to formalize a closer, more permanent relationship with the United States. Representatives of the Marianas "on numerous occasions expressed both formally and informally . . . through petitions, resolutions adopted by the District Legislature and Municipal Councils and in referenda, the strong desire that the people of the Northern Mariana Islands become a part of the United States."²¹² On November 9, 1969, the Marianas voted in favor of reintegration with

201. Exec. Order No. 11,021, 3 C.F.R. 600 (1959–1963).

202. Dep't of Interior Order No. 2918, pt. II, § 1, 34 Fed. Reg. 157 (1969). The 1967 Congress provided that this high commissioner shall be appointed by the president and confirmed by the Senate. Act of May 10, 1967, Pub. L. No. 90-16, § 2, 81 Stat. 15 (codified at 48 U.S.C. § 1681(a)).

203. LEIBOWITZ, *supra* note 100, at 497. Authority to audit TTPI and the Northern Mariana Islands' government accounts was vested in the inspector general of the Department of the Interior. 48 U.S.C. § 1681b (2000).

204. LEIBOWITZ, *supra* note 100, at 499.

205. U.S. DEP'T OF ST., TRUST TERRITORY OF THE PACIFIC ISLANDS 15 (1954).

206. See LEIBOWITZ, *supra* note 100, at 499. Leibowitz notes that "the Marshallese, in 1953, told the United Nations Visiting Mission that their culture and their district were unique and they did not want to lose themselves in an amalgamation with other Micronesians." *Id.*

207. *Id.* at 500.

208. LAUGHLIN, *supra* note 190, at 471.

209. Dep't of Interior Order 2882, 29 Fed. Reg. 13,613 (Sept. 28, 1964); see generally NORMAN MELLER, THE CONGRESS OF MICRONESIA: DEVELOPMENT OF THE LEGISLATIVE PROCESS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS (1969).

210. LEIBOWITZ, *supra* note 100, at 501.

211. *Id.*

212. Chairman Edward DLG. Pangelinana, Remarks at the Signing of the [Northern Marianas] Covenant (Feb. 15, 1975), in *To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands," and for Other Purposes: Hearing on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 Before the House Subcomm. on Territorial and Insular Affairs of the Comm. on Interior and Insular Affairs, 94th Cong. 10* (1975); see also Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional*

Guam,²¹³ when the United States did not accede to this request, the Mariana legislature passed a resolution threatening to secede from the Trusteeship²¹⁴ and, in May 1972, created its own Political Status Commission that succeeded in entering into separate negotiations with the United States.²¹⁵

The United Nations took a strong position in favor of treating the TTPI as a unitary whole; nevertheless, a U.N. visiting mission to the TTPI in 1973 stated that while the United States was “obligated to promote national [pan-Micronesian] unity in every way possible,” the people(s) of Micronesia “must work out for themselves what kind of future links they wish to have with one another.”²¹⁶ Although the Congress of Micronesia objected strongly to the separate talks,²¹⁷ the United States signed a Covenant establishing the U.S. Commonwealth of the Northern Mariana Islands in 1975.²¹⁸ The Covenant was approved by a 78% vote in favor of commonwealth status by the inhabitants of the Northern Marianas.²¹⁹ In July 1978, a constitution was developed for the rest of Micronesia and voted on in a referendum. The Marshall Islands and Palau rejected the constitution and began their own separate negotiations with the United States.²²⁰

With respect to the tension between the pursuit of separate negotiations and the U.N. presumption against fragmentation of political entities in the context of decolonization, one scholar of the region has observed:

[T]he emphasis on the colonial territorial boundaries can lead to inequitable results for minority groups, especially when there is really no “national or territorial integrity.” Here is where the U.N. case [for treating the TTPI as a unitary whole] broke down. Micronesia is not an integrated whole *and it never was*. It is not contiguous; its people are ethnically and linguistically diverse. Its

Principles and Innovation in a Pacific Setting, 65 GEO. L.J. 1373, 1379 (1977) (stating that by 1972, “[t]he desire of the Northern Marianas for a permanent relationship with the United States had been a matter of public record for more than twenty-five years”).

213. Guam turned down this request in a special plebiscite. LEIBOWITZ, *supra* note 100, at 504; *see also* S. Rep. No. 94-433, at 19 (1975) (“Guamanian politicians . . . later explained that the Guam plebiscite was poorly organized and inadequately publicized with the result that the issues were not for the most part understood.”).

214. Third Marianas Dist. Leg., Res. No. 30-1971, 5th Sess., at 142 (N. Mar. I. 1971).

215. LAUGHLIN, *supra* note 190, at 430. These separate negotiations were criticized in the United Nations by the Soviet delegation, which claimed that the United States was following a divide and conquer policy in Micronesia. *Id.* at 430 n.36.

216. LAUGHLIN, *supra* note 190, at 430 (quoting Report of the U.N. Visiting Mission to the Trust Territory of the Pacific Islands); *see also* LEIBOWITZ, *supra* note 100, at 502 (placing greater emphasis on the United Nation’s condemnation of secession). Article 6 of the 1947 Trusteeship Agreement had given the United States the responsibility of “promot[ing] the development of the inhabitants of the Trust Territory toward self-government or independence as may be appropriate [sic] to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned.” Trusteeship Agreement, *supra* note 193, art. 6. It is interesting to note the repeated use of the plural “peoples” in this context, which facilitated the argument that the “people” of the Northern Mariana Islands were entitled to a self-determination arrangement based on their own distinct preferences. Willens & Siemer, *supra* note 212, at 1380 n.29.

217. LEIBOWITZ, *supra* note 100, at 501.

218. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified at 48 U.S.C. § 1801 (2000)).

219. LEIBOWITZ, *supra* note 100, at 505; *see also* S. Rep. No. 94-433, at 413–14 (1975) (approving the ratification of the Covenant). Although a U.N. mission attested to the “democratic procedure” of the referendum, Arnold Leibowitz takes issue with the phrasing of the question as requiring an affirmative vote for Commonwealth status, or a negative vote without clear status implications. LEIBOWITZ, *supra* note 100, at 505.

220. LEIBOWITZ, *supra* note 100, at 507.

geographic dispersion was unprecedented. In such circumstances, national unity is a consummation devoutly to be wished but hardly likely of achievement.²²¹

The end result of the various status negotiations was the creation of the Commonwealth of the Northern Mariana Islands, and the conclusion of compacts with three Freely Associated States: the Federated States of Micronesia (Pohnpei, Truk, Yap, and Kosrae), the Republic of the Marshall Islands, and the Republic of Palau. The U.N. Security Council deemed in 1990 that the Commonwealth of Northern Mariana Islands (CNMI), the Federated States of Micronesia (FSM), and the Marshall Islands had become “fully self-governing,” and it made the same determination for Palau in 1994.²²²

B. *The Commonwealth of the Northern Mariana Islands*

1. A Social and Economic Survey

The CNMI consists of fourteen islands in the North Pacific Ocean, about three-quarters of the way from Hawaii to the Philippines.²²³ The total land area of the CNMI is 176.5 square miles.²²⁴ The three developed islands are Saipan (46.5 square miles), Rota (32.8 square miles), and Tinian (39.2 square miles), all of which are located in the southern part of the archipelago.²²⁵ The population of the islands is approximately 74,600,²²⁶ and is composed of the indigenous Chamorros, Carolinians, other Micronesians, and immigrants from other Asian countries.²²⁷ Strikingly, a 1996 Census estimate put the resident population of the CNMI at 52,000 people.²²⁸ Well over 20,000 documented aliens lived in the CNMI in 1990;²²⁹ a 1997 joint U.S.-CNMI government report noted that 90% of the workforce consisted of alien laborers.²³⁰

221. *Id.* at 503.

222. The Trusteeship Agreement for the CNMI, the Marshall Islands, and the FSM was terminated by Security Council Resolution 683 of Dec. 22, 1990. S.C. Res. 683, U.N. SCOR, 45th Sess., 2972d mtg. at 29, U.N. Doc. S/RES/683 (1990). The FSM and the Marshall Islands became U.N. members in Security Council Resolutions 703 and 704, respectively. S.C. Res. 703, U.N. SCOR, 46th Sess., 3002d mtg. at 47, U.N. Doc. S/RES/703 (1991); S.C. Res. 704, U.N. SCOR, 46th Sess., 3003d mtg. at 48, U.N. Doc. S/RES/704 (1991). Palau's status as a trust territory was terminated by Security Council Resolution 956, and Palau became a U.N. member under Security Council Resolution 963. S.C. Res. 956, U.N. SCOR, 49th Sess., 3455th mtg. at 128, U.N. Doc. S/RES/956 (1994); S.C. Res. 963, U.N. SCOR, 49th Sess., 3469th mtg. at 130, U.N. Doc. S/RES/963 (1994).

223. CIA, *The World Factbook* (2001) [hereinafter *World Factbook II*], available at <http://www.cia.gov/cia/publications/factbook/geos/cq.html> (last visited Oct. 29, 2003). Geographically speaking, the southernmost island in this archipelago is Rota. *Id.*

224. CNMI Government, *Geography & Location*, at <http://www.mariana-islands.gov.mp/geog.htm> (last visited Oct. 29, 2003).

225. *Id.*

226. *World Factbook II*, *supra* note 223 (July 2001 estimate). Over 75% of the population lives on the island of Saipan. See U.S. Dep't of Commerce, *Population & Housing Profile: 2000—The Commonwealth of the Northern Mariana Islands* 1, 19 (May 2003), available at <http://www.census.gov/prod/cen2000/island/CNMIprofile.pdf> (last visited Oct. 29, 2003).

227. See Northern Mariana Islands, *People*, at <http://www.mariana-islands.gov.mp/people.htm> (last visited Oct. 29, 2003); see also *World Factbook II*, *supra* note 223. It is estimated that 86% of the population speaks a language other than English at home. *Id.*

228. U.S. Bureau of the Census, 1996 Statistical Abstract of the United States, Section 19: Outlying Areas, Estimated Resident Populations with Projections: 1960 to 2020, tbl.1309 (1996), available at <http://www.census.gov/prod/2/gen/96statab/outlying.pdf> (last visited Oct. 29, 2003).

229. Robert S. Florke, Note, *Castaways on Gilligan's Island: The Plight of the Alien Worker in the Northern Mariana Islands*, 13 TEMP. INT'L & COMP. L.J. 381, 396 n.147 (1999).

230. *Id.* at 396.

The predominant religion among CNMI residents is Roman Catholicism. The major languages are English, Chamorro, and Carolinian, though the Japanese influence is still noticeable. The Chamorro language and culture link the CNMI culturally and historically to Guam.²³¹ The Spanish policy of forced resettlement of the Chamorro people of the Northern Marianas to Guam meant that waves of immigrants from the Caroline Islands to Saipan in the nineteenth century formed the dominant community on the island; the Chamorros were first permitted to return from Guam to the Northern Marianas in 1816.²³² The provision in the CNMI Constitution for an executive assistant to the governor for Carolinian affairs responds to the Carolinian concern that self-government for the Northern Marianas would bring discrimination at the hands of the existing Chamorro majority.²³³

2. Toward a Commonwealth Arrangement

As described above, the Marianas Political Status Commission pursued separate negotiations with the United States from 1972 to 1975, culminating in the signing, on February 15, 1975, of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States.²³⁴ The inhabitants of the Northern Marianas approved the Covenant with a 78% affirmative vote on June 17, 1975.²³⁵ Following U.S. congressional approval, the Covenant was enacted into law on March 24, 1976.²³⁶

The Covenant has been characterized as “the preconstitutional act by which the people of the Northern Marianas exercised their right of self-determination and became a part of the United States.”²³⁷ Section 203 of the Covenant specifies the following requirements for the CNMI Constitution:

- (a) The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches, and will contain a bill of rights.
- (b) The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor and such other officials as the Constitution or laws of the Northern Mariana Islands may provide.
- (c) The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

231. LEIBOWITZ, *supra* note 100, at 521.

232. *Id.* at 523.

233. *Id.* at 524–25 (referring to N. MAR. I. CONST. art. III, § 18(a)).

234. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 90 Stat. 263.

235. *See supra* note 218 and accompanying text.

236. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 90 Stat. 263. The Trusteeship was terminated by Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986).

237. Willens & Siemer, *supra* note 212, at 1381.

(d) The judicial power of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Mariana Islands may provide. The Constitution or laws of the Northern Mariana Islands may vest in such courts jurisdiction over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction.²³⁸

Within these parameters, the people of the CNMI were free to design their own political institutions. The Northern Marianas legislature adopted legislation authorizing a constitutional convention, which was approved by the resident commissioner on August 19, 1976.²³⁹ Less than one year later, on March 6, 1977, the inhabitants of the Northern Marianas adopted the proposed constitution by a 93% affirmative vote.²⁴⁰

The capital of the CNMI is Saipan, the former seat of the U.S. Trust Territory government. The CNMI has a locally elected governor, lieutenant governor, and legislature;²⁴¹ its inhabitants are U.S. citizens but do not vote in U.S. presidential elections.²⁴² An elected resident representative maintains an office in Washington, D.C.²⁴³ The Commonwealth has its own trial and appellate courts,²⁴⁴ as well as a U.S. federal district court.²⁴⁵ The U.S. federal courts, and in particular the Ninth Circuit Court of

238. 48 U.S.C. § 1801-203.

239. Willens & Siemer, *supra* note 212, at 1384.

240. *Id.* at 1373. The text of the CNMI Constitution is available online at http://www.saipan.com/gov/branches/senate/cnmi_constitution.html (last visited Oct. 29, 2003). The Constitution was approved by President Carter in October 1977, and it came into effect on January 9, 1978. Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977). The first government was elected under the Constitution on December 12, 1977 and took office on January 9, 1978. LAUGHLIN, *supra* note 190, at 435.

241. N. MAR. I. CONST. art. III, §§ 1-4. Section 8 of the "Schedule on Transitional Matters" attached to the 1976 Constitution provided the following "Interim Definition of Citizenship":

For the period from the approval of the Constitution by the people of the Northern Mariana Islands to the termination of the Trusteeship Agreement, the term United States citizen or United States national as used in the Constitution includes those persons who, on the date of the approval of the Constitution by the people of the Northern Mariana Islands, do not owe allegiance to any foreign state and who qualify under one of the following criteria:

- a) persons who were born in the Northern Mariana Islands, who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;
- b) persons who are citizens of the Trust Territory of the Pacific Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Mariana Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; or
- c) persons domiciled in the Northern Mariana Islands on the date of the approval of the Constitution by the people of the Northern Mariana Islands who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.

N. MAR. I. CONST. Schedule on Transitional Matters, § 8.

242. World Factbook II, *supra* note 223.

243. *Id.*; see also N. MAR. I. CONST. art. V, amended by N. MAR. I. CONST. amend. XIV.

244. These are the Superior Court and Supreme Court, respectively. See Commonwealth Judicial Reorganization Act of 1989, 1 N. MAR. I. CODE § 3102 (1997).

245. 48 U.S.C. § 1801, art. IV; see also N. MAR. I. CONST. Schedule on Transitional Matters, § 4. The district court is not a true Article III court, in part because the U.S. district court judge for the NMI is appointed for

Appeals, have been called upon on numerous occasions to interpret the applicability of U.S. laws and constitutional provisions to the Northern Marianas.

3. Legal Relationship to the United States Under American Law

The Covenant establishes a federal relationship between the Northern Marianas and the United States that lies “somewhere on the spectrum between that of a state and a territory.”²⁴⁶ The Covenant with the United States stipulates that the CNMI will be “a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America”;²⁴⁷ that the Covenant, together with applicable provisions of the U.S. Constitution and treaties and laws applicable to the NMI, will be the supreme law;²⁴⁸ that the people of the Northern Marianas will have the right to local self-government and control over internal affairs;²⁴⁹ that the United States will have complete responsibility and authority with respect to foreign affairs and defense;²⁵⁰ and that the United States may enact legislation applicable to the NMI in accordance with certain guidelines.²⁵¹ It is this last provision that has proved a point of contention in establishing the parameters of U.S. control over NMI affairs, with some people in the NMI arguing for a narrow reading of the combined provisions to limit the legislative power of the United States in the NMI exclusively to foreign affairs and defense matters.²⁵²

The United States has claimed plenary power to govern the Commonwealth under the territorial clause of the U.S. Constitution.²⁵³ This claim was foreshadowed by the U.S. Congress in its analysis of the Covenant prior to its adoption: “Although described as a commonwealth, the relationship is territorial in nature with full sovereignty vested in the United States, and the plenary legislative authority vested in the United States Congress.”²⁵⁴ However, this language is not dispositive. In particular, it has been argued that the Senate,

a term of years rather than having life tenure, but it has all of the jurisdiction of a true Article III court. LAUGHLIN, *supra* note 190, at 450.

246. Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under Its Covenant with the United States*, 71 OR. L. REV. 127, 135 (1992).

247. 48 U.S.C. § 1801-101.

248. *Id.* § 1801-102. The scope of applicable laws is further defined in Article V. *Id.* art. V.

249. *Id.* § 1801-103.

250. *Id.* § 1801-104.

251. *Id.* The statute says:

The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

48 U.S.C. § 1801-105.

252. LAUGHLIN, *supra* note 190, at 432-33.

253. Elizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L.J. 257, 280 (1990); see generally *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1990) (detailing the argument by the United States that the Territorial Clause of the U.S. Constitution gives Congress plenary legislative authority over the CNMI).

254. S. REP. NO. 94-433, at 15 (1975).

in affirming the Covenant, “put in legislative history protective of its own authority,”²⁵⁵ and that such statements should be discounted accordingly. In 1986, while the Covenant was before the United Nations, the Marianas legislature, by contrast, issued a joint resolution and a major report entitled *Self-Determination Realized*, arguing, contrary to the language of the Covenant, that the territorial clause did not apply at all and that the mutual consent provision applied to the entire Covenant:²⁵⁶ “[n]either Congress nor any other branch or agency of the United States Government may utilize the territorial clause or any other source of power, for that matter, to supersede the sovereign power of the CNMI to control and regulate matters of local concern.”²⁵⁷

Not unexpectedly, a more plausible characterization lies somewhere in-between. One author suggests the following interpretation:

As used in connection with insular political communities affiliated with the United States, the concept of a “commonwealth” anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time.²⁵⁸

In particular, the unique status of the CNMI is reflected in its land alienation restrictions, which have been upheld as exempt from challenge under the federal Equal Protection Clause,²⁵⁹ and Commonwealth control over immigration.²⁶⁰ Additionally, NMI

255. LEIBOWITZ, *supra* note 100, at 543.

256. *Id.* at 544–45; *see also* Van Dyke, *supra* note 147, at 483.

257. LEIBOWITZ, *supra* note 100, at 544 (quoting COMMONWEALTH OF THE NORTHERN MARIANAS LEGISLATURE, *SELF-DETERMINATION REALIZED* 25 (1986)). More recently,

[t]here have been attempts to adopt an analysis of § 502 requiring each law to be tested against an additional standard—whether it is consistent with the United States’ guarantee to the Commonwealth of the right of local self-government. This reflects a recent political movement in the Commonwealth to assert more NMI “sovereignty” than is recognized by the United States or reflected in court opinions interpreting the Covenant.

Herald, *supra* note 246, at 136 n.49; *see also* McKibben, *supra* note 253, at 282–87 (stating that the Covenant’s authority cannot be overridden by the territorial or any other clause in the U.S. Constitution). The Ninth Circuit has resisted relying on the Territorial Clause as a basis for examining the scope of U.S. federal power in the CNMI in a number of decisions. *See, e.g.,* Hillblom v. United States, 896 F.2d 426, 429 (9th Cir. 1990) (“[T]he authority of the United States towards the CNMI arises solely under the Covenant.”); *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir. 1984) (indicating that the Covenant has created a “unique” relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations). These cases were affirmed by *United States ex rel. Richards v. Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993) (suggesting that self-government under the Covenant does not preclude federal legislation that affects the internal affairs of the CNMI, but does require weighing the federal interest served by the legislation in question against its degree of intrusion into internal affairs); *see also* Keith Highet et al., *International Decisions: United States v. Guerrero*, 4 F.3d 749, 88 AM. J. INT’L L. 337, 339 (1994) (commenting on the substance and significance of the *Guerrero* decision).

258. Van Dyke, *supra* note 147, at 451.

259. *See, e.g.,* Wabot v. Villacrusis, 958 F.2d 1450, 1462–63 (9th Cir. 1990) (holding that land alienation restrictions in Article XII of the NMI Constitution, implementing § 805 of the Covenant, are exempted from federal equal protection review under Covenant § 501(b) because the right of equal access to long-term interests in commonwealth real estate is not “fundamental in the international sense”).

260. 48 U.S.C. § 1801-503 (stating that federal immigration laws presently inapplicable to the TTPI “will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement”). Note that this provision has given rise to

courts rely on Chamorro and Carolinian custom and culture in interpreting local law,²⁶¹ helping to foster a legal culture distinct from that found on the mainland United States.²⁶²

4. Foreign Affairs

Section 104 of the Covenant provides: “The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.”²⁶³ This constitutes one of the principal differences between the Covenant and the Compacts of Free Association with the other islands of the former TTPI,²⁶⁴ since the Freely Associated States have responsibility for conducting foreign affairs in their own name and right.²⁶⁵

5. Legal Status Under International Law

In the spring of 1987, representatives of the NMI Task Force on the Termination of the Trusteeship presented a Commonwealth joint resolution to the U.N. Trusteeship Council asking “that any agreement terminating the Trusteeship include a resolution stating that the United States has no authority to govern internal affairs under the territorial clause.”²⁶⁶ Security Council Resolution 683 of 1990 terminated the Trusteeship Agreement for the CNMI, the Republic of the Marshall Islands, and the Federated States of Micronesia, but it did not enter into specifics about the parameters of internal governance for any of the former trust territories, stating:

tension between the NMI garment industry and U.S. labor leaders, who object to the use of the “made in the U.S.A.” label on goods produced outside the constraints of federal minimum wage law and other federal labor standards. LAUGHLIN, *supra* note 190, at 434; *see also* Herald, *supra* note 246, at 167–69 (describing the disputes that have arisen between the U.S. Department of Labor and NMI garment companies because of generally poor working conditions); Florke, *supra* note 229, at 389–90 (explaining that the Northern Mariana Islands’ control over immigration has failed to fulfill the original goal of protecting cultural stability).

261. LAUGHLIN, *supra* note 190, at 458–59.

262. Arnold Leibowitz explains:

Micronesian customary law de-emphasizes (compared to the U.S. legal system) notions of individual guilt, and individual rights and responsibility, and places greater stress on the groups to which the accused and victims belong: families, clans and community groups. It emphasizes forgiveness to prevent further violence and conflict, to soothe wounded feelings, and to ease the intense emotions of those most directly involved. Customary settlement by social process (apology and restitution) disposed entirely of the rights or responsibilities of the disputants.

LEIBOWITZ, *supra* note 100, at 498.

263. 48 U.S.C. § 1801.

264. McKibben, *supra* note 253, at 275.

265. Compact of Free Association: Federated States of Micronesia and Republic of the Marshall Islands, 48 U.S.C. § 1901-121 (1986); Compact of Free Association: The Government of Palau, 48 U.S.C. § 1931-121 (1986).

266. McKibben, *supra* note 253, at 281. Lizabeth McKibben notes of this meeting:

Mr. Pedro Atalig analogized the Northern Marianas’ grant of sovereignty in the areas of military and foreign affairs to the following language in *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5th Cir. 1975): “A nation is understood to cede a portion of [its] territorial jurisdiction when [it] allows the troops of a foreign nation to pass through [its] dominions.”

Id. at 281 n.129.

Satisfied that the peoples of the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands have freely exercised their right to self-determination in approving their respective new status agreements in plebiscites observed by visiting missions of the Trusteeship Council and that, in addition to these plebiscites, the duly constituted legislatures of these entities have adopted resolutions approving the respective new status agreements, thereby freely expressing their wish to terminate the status of these entities as parts of the Trust Territory²⁶⁷

The CNMI is not an independent state, but it is a subject of international concern as a result of its former status as a trust territory. It has been suggested that interpretations of the Covenant that would subject the CNMI to the U.S. Constitution's territorial clause "would directly contradict the United Nations's charge to effect self-government, independence, or integration with the administering authority."²⁶⁸ While the United Nations terminated the trusteeship when the Security Council adopted Resolution 683, the contours of the relationship between the CNMI and its former administering authority remain in a state of evolution. For the time being, as noted above, the definition of these contours has essentially been left to local and federal courts, without the involvement of the international community.²⁶⁹

6. Participation in the International Process

The CNMI is an associate member of the Economic and Social Commission for Asia and the Pacific, is involved with the International Criminal Police Organization (Interpol) at the sub-bureau level, and is a member of the South Pacific Commission.²⁷⁰ This formal involvement in international organizations, though limited, provides opportunities for useful contacts and relationships with foreign states, especially in the Pacific region. Unlike Puerto Rico, the CNMI does not at this time have the equivalent of a state department to manage its relations with foreign states.

267. S.C. Res. 683, *supra* note 222, at 29.

268. McKibben, *supra* note 253, at 286.

269. With respect to institutional competence for shaping the legal structure of newly self-governing territories, it is interesting to note the 1982 judgment of the Court of Appeal of Western Samoa in the case of *Attorney-General v. Saipa'ia Olomalu*, the first to discuss the interpretation of the Constitution of Western Samoa. That case raised the issue of whether certain provisions of the 1963 Electoral Act violated the Equal Protection requirement of the Constitution, in particular the system limiting the right to vote in the forty-one territorial constituencies to the matai, or head of the family. The Court ruled that the Equal Protection requirement did not extend to voting rights, absent any direct reference to universal suffrage in the Constitution. Most interestingly, the Court reached the conclusion that the central questions of the relationship of the matai system to democratic values of effective voice for adult citizens, and whether continuing to use this system is in the long-term interests of Western Samoa, "are questions, not of law, but of social and political policy: questions which, on our interpretation of the Constitution, are to be decided by Parliament, not by the courts." *A.-G. v. Saipa'ia Olomalu*, 14 V.U.W.L.R. 275, 293 (1984).

270. See World Factbook II, *supra* note 223.

C. *The Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau*

1. A Social and Economic Survey of the RMI

The Marshall Islands form the easternmost part of the former TTPI. The Republic of the Marshall Islands (RMI) encompasses twenty-nine coral atolls and five small low-lying islands, with a total land surface area of 181.3 square kilometers.²⁷¹ The population is approximately 70,800.²⁷² English is universally spoken and is the official language; there are also two major Marshallese dialects from the Malayo-Polynesian language family, and Japanese is also spoken.²⁷³ The predominant religion is Protestantism.²⁷⁴

Traditional Marshallese society is organized around matrilineal kin groups; as with most of Micronesia, the “society [is] stratified, with the land and other communal resources under the control of chiefs.”²⁷⁵ It has been suggested that the primary motivation for the Marshallese in choosing to be politically separate from the rest of Micronesia was not cultural, but rather economic: namely, the Marshall Islands’ unhappiness over having to share revenues obtained from the United States for the use of Kwajalein Lagoon as a testing ground for intercontinental ballistic missiles (ICBMs).²⁷⁶

The RMI economy relies primarily on U.S. government assistance (in the range of \$65 million annually), although there are efforts to bolster tourism and other local industries.²⁷⁷ The currency is the U.S. dollar. The RMI has no military forces, although it does have a police force and the option of establishing a coast guard.²⁷⁸

The RMI acknowledges that “our country faces formidable challenges in the form of rapid population growth, and accelerated sea-level rise, among others.”²⁷⁹ Major ongoing issues in its relationship with the United States concern continued U.S. use of Kwajalein Atoll as a missile testing ground, and continued bitterness about U.S. nuclear testing at Bikini and Enewetak Atolls from 1946 to 1958, despite the inclusion of reparations provisions in the Free Association Compact.²⁸⁰

271. See CIA, *The World Factbook* (2001) [hereinafter *World Factbook III*], available at <http://www.cia.gov/cia/publications/factbook/geos/rm.html> (last visited Oct. 29, 2003).

272. *Id.* (Jul. 2001 est.). For additional statistics, see *Republic of the Marshall Islands Statistical Information*, at <http://www.rmiembassyus.org/statistics/statistics.html> (last visited Oct. 29, 2003).

273. *World Factbook III*, *supra* note 271.

274. Republic of the Marshall Islands, *Overview of the Marshall Islands* [hereinafter *Overview of the Marshall Islands*], at <http://www.rmiembassyus.org/about/overview.html> (last visited Nov. 5, 2003).

275. LAUGHLIN, *supra* note 190, at 479.

276. *Id.* at 480; see generally Daniel C. Smith, *Marshall Islands, Tradition and Dependence*, in *POLITICS IN MICRONESIA* 55 (1983) (describing the ongoing struggles within the Marshall Islands in establishing itself as an independent and democratic state).

277. *World Factbook III*, *supra* note 271.

278. *Id.*

279. *Overview of the Marshall Islands*, *supra* note 274.

280. See LEIBOWITZ, *supra* note 100, at 601–04. Supplemental Agreements to the Compact dealt specifically with these issues. See Dep’t of the Interior, *Marshalls*, at <http://www.doi.gov/oia/islandpages/rmipage.htm> (last visited Nov. 5, 2003); see also *infra* notes 304–15 and accompanying text (laying out the terms of the Compact of Free Association and outlining the responsibilities that the United States has toward the FSM regarding defense and reparations).

2. A Social and Economic Survey of the FSM

The Federated States of Micronesia (FSM) comprise four major island groups totaling 607 islands, including Pohnpei (Ponape), the Truk (Chuuk) Islands, the Yap Islands, and Kosrae.²⁸¹ The islands encompass a total land area of 702 square kilometers,²⁸² spread over three million square miles of ocean.²⁸³ The islands are inhabited by a population of 135,869, which is composed of nine Micronesian and Polynesian ethnic groups.²⁸⁴ The population is roughly evenly divided between Roman Catholicism and Protestantism. English is the official and common language, but Trukese, Pohnpeian, Yapese, and Kosrean are spoken in the respective states.

The FSM Constitution incorporates a bill of rights, but it also recognizes the importance of protecting custom. If a court finds that challenged national, state, or municipal legislation conflicts with the declaration of rights, the Constitution specifies that "protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action."²⁸⁵ "Among the states, only Yap has given its traditional chiefs a formal governmental role."²⁸⁶

The FSM economy "consists primarily of subsistence farming and fishing";²⁸⁷ geographical isolation and a poorly developed infrastructure pose major obstacles to industries, such as tourism, that could contribute to long-term growth.²⁸⁸ The currency is the U.S. dollar. The 1986 Compact of Free Association provided for fifteen years of financial and technical assistance from the United States; the winding down of this assistance under the terms of the Compact resulted in a severe economic depression in 1999 and continued economic fragility. To give one example of the lack of economic diversity and development, two-thirds of the FSM labor force are government employees.²⁸⁹

3. A Social and Economic Survey of Palau

Palau (or "Belau," as it is referred to locally) consists of more than two hundred islands in the Caroline Island chain, only eight of which are permanently inhabited.²⁹⁰ The total land area is 458 square kilometers, and the population is approximately 19,409.²⁹¹ A

281. CIA, *The World Factbook* (2001) [hereinafter *World Factbook IV*], available at <http://www.cia.gov/cia/publications/factbook/geos/fm.html> (last visited Oct. 29, 2003).

282. *Id.*

283. LEIBOWITZ, *supra* note 100, at 615.

284. *World Factbook IV*, *supra* note 281; see generally Information on the Federated States of Micronesia, *People* (charting the population growth of the four major island groups and citing census statistics), at <http://www.fsmgov.org/info/people.html> (last visited Oct. 29, 2003). For 1994 statistics on the ethnic break-down of the RMI population, see Information on the Federated States of Micronesia, *Culture/Language*, at <http://www.fsmgov.org/info/culture.html> (last visited Oct. 29, 2003).

285. MICR. CONST. art. 5, § 2; see generally Alan B. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419, 459–64 (1986) (discussing how the Constitution grants both state and national governments the power to protect local laws even though these might conflict with certain other constitutional rights).

286. LEIBOWITZ, *supra* note 100, at 616.

287. *World Factbook IV*, *supra* note 281.

288. See generally Information on the Federated States of Micronesia, *Economy*, at <http://www.fsmgov.org/info/econ.html> (last visited Oct. 29, 2003).

289. *World Factbook IV*, *supra* note 281.

290. Fact Sheets, *U.S. Insular Areas and Freely Associated States*, available at <http://www.doi.gov/oia/facts.html#palau> (last visited Oct. 29, 2003).

291. CIA, *The World Factbook* (2002) [hereinafter *World Factbook V*], available at <http://www.cia.gov/cia/publications/factbook/geos/ps.html> (last visited Oct. 29, 2003).

variety of forms of Christianity are observed on the islands (inhabitants include Catholics, Seventh-Day Adventists, Jehovah's Witnesses, the Assembly of God, the Liebenzell Mission, and Latter-Day Saints), and one-third of the population observes the indigenous Ngara Modekngei (United Sect) religion.²⁹² The ethnic make-up of the islands is also quite diverse: it has been estimated at 70% Palauan (Micronesian with Malayan and Melanesian admixtures), 28% Asian (mainly Filipinos, followed by Chinese, Taiwanese, and Vietnamese), and 2% white.²⁹³ English and Palauan are the official languages in all states except Sonsoral (Sonsorlese and English are official), Tobi (Tobi and English are official), and Angaur (Angaur, Japanese, and English are official).²⁹⁴

The economy consists primarily of subsistence agriculture and fishing, with a growing tourism industry. The government is the major employer of the work force, and the per capita income in Palau compares very favorably with that of the Philippines and the other parts of Micronesia.²⁹⁵ Because Palau did not ratify its Compact with the United States until 1994, it is currently benefiting from a high level of U.S. aid, in return for furnishing military facilities.²⁹⁶ Like the other Freely Associated States, Palau uses the U.S. dollar.

In addition to its unique level of practice of indigenous religion, Palau has consistently maintained an identity and self-perception distinct from that of the rest of Micronesia:

Belauan nationalism has its roots in a strong sense of cultural identity born of centuries of relative isolation and self-reliance. Anthropologists believe that Belau, which is made up mostly of high islands of volcanic origin, was settled by migrations from the Indonesian-Philippine archipelago. But Belauan legends view the islands as a universe unto itself.²⁹⁷

Salient elements of Palauan culture have been described as follows:

Palau's social organization is highly complex and competitive. The race for money, prestige and power, the main thrust of which used to be for political power within a clan or village, was the focus from which most events occurred, such as sports competitions and wars.

Palauan villages were, and still are, organized around 10 clans reckoned matrilineally. A council of chiefs from the 10 ranking clans governed the village, and a parallel council of their female counterparts held a significant advisory role in the control and division of land and money.

Men and women had strictly defined roles to play in the continuity of the village. The sea was the domain of men who braved its fury to harvest the fish necessary to sustain the village and wage battle. Inter-village wars were common, so men spent a lot of time in the men's meeting houses mastering techniques of canoe building and refining their skills with weapons. Women, on

292. *Id.*

293. *Id.* (2000 est.).

294. *Id.*

295. *Id.*

296. *Id.*

297. Frank Quimby & Gwenda L. Iyechad, *Belau: Super-port, Fortress or Identity*, in *POLITICS IN MICRONESIA* 102, 108 (1983).

the other hand, held sway in the home. They cultivated vegetables and harvested shellfish and sea cucumbers from the shallow reefs

Even today, despite the influence of generations of explorers, traders, soldiers and administrators from several nations, Palauans still maintain the cultural traditions that make it unique in the Pacific.²⁹⁸

The reputed "aggressiveness" of Palauan society has been emphasized by commentators.²⁹⁹ It has also been observed, however, that "[t]oday the strong group relationship which characterized traditional Palau society has changed considerably, to an individual or personal, orientation."³⁰⁰ As in many societies in transition, the breakdown in traditional sources of social support seems to be correlated with a rise in societal problems, such as crime and alcohol abuse.³⁰¹

4. Toward Free Association: The RMI and the FSM

The Marshall Islands adopted a Constitution on December 21, 1978 that became effective on May 1, 1979. The government is based on a parliamentary system and includes a Council of Iroij that may request reconsideration of any bill affecting customary law or traditional practice.³⁰² The Marshall Islands and the United States signed the Compact of Free Association on June 25, 1983, and the people of the Marshall Islands approved the Compact in a U.N.-observed plebiscite on September 7, 1983. The Compact was subsequently approved by the U.S. Congress with minor modifications; it was signed into U.S. law on January 14, 1986,³⁰³ and entered into force on October 21, 1986.³⁰⁴ The United Nations recognized the Republic of the Marshall Islands as fully self-governing in free association with the United States in Security Council Resolution 683 of December 22, 1990.³⁰⁵

The debate over ratification of the Marshall Islands Compact illustrates the range of political interests and perspectives that can lead to support for closer political ties to the former trustee. Arnold Leibowitz indicates:

Opposition to the Compact came from three principal groups: first, those southern Marshallese atolls committed to Commonwealth, rather than FAS status and politically opposed to the current Marshallese leadership; second, those Kwajalein landowners dissatisfied with the terms in the Compact of the land use agreement for Kwajalein Missile Range; and third, those people affected by the U.S. atomic tests who were dissatisfied with their compensation under the Compact. All of these groups desired to maintain either strong financial or political ties with the U.S. government.³⁰⁶

298. Palau National Communications Corporation, *Palauan Culture*, at <http://www.palaunet.com/html/culture.html> (last visited Oct. 29, 2003); see also Quimby & Iyechad, *supra* note 297, at 105-06.

299. E.g., LEIBOWITZ, *supra* note 100, at 622, 633.

300. *Id.* at 634.

301. See *id.* at 631 (giving statistical examples of increases in crime and alcohol-related incidents).

302. LEIBOWITZ, *supra* note 100, at 613; MARSH. IS. CONST. art. III, § 2(b).

303. Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1800 (1986).

304. See generally U.S. Dep't of St., *Background Note: Marshall Islands*, (July 2000), at <http://www.state.gov/r/pa/bgn/index.cfm?docid=2778> (last visited Oct. 29, 2003).

305. S.C. Res. 683, *supra* note 222, at 29.

306. LEIBOWITZ, *supra* note 100, at 611.

A central issue of concern during the negotiations over the Compact and the subsequent ratification process was the question of compensation for U.S. nuclear testing in the islands. Section 177(a) of the Compact of Free Association states:

The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.³⁰⁷

A separate agreement provides for the Marshall Islands Government's espousal of its citizens' claims and removes such claims from the jurisdiction of U.S. courts.³⁰⁸ The Marshall Islands Nuclear Claims Tribunal was established in 1988 with jurisdiction to "render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program."³⁰⁹ Under the Section 177 Agreement, the United States agreed to provide a compensation fund of \$150 million for those injured by the nuclear tests, part of which was earmarked for the Claims Tribunal.³¹⁰ Nevertheless, the Tribunal has reported that "[w]ith only \$45.75 million available for actual payment of awards made by the Tribunal, it has become clear that the original terms of the settlement agreement are manifestly inadequate."³¹¹

Despite the failed attempt to promote political unity throughout the former TTPI, four states (Chuuk, Pohnpei, Yap, and Kosrae) ratified the Constitution of the Federated States of Micronesia in a U.N.-monitored referendum on July 12, 1978;³¹² the Constitution became effective on May 10, 1979.³¹³ The FSM negotiated a Compact of Free Association with the United States, substantially similar to that between the United States and the Marshall Islands, and signed the Compact on October 1, 1982.³¹⁴ On June 21, 1983, the Compact was submitted to voters in the FSM.³¹⁵ Although the Compact failed by a vote of 51% on Pohnpei, Pohnpei was bound by the overall approval of the rest of the Compact by the rest of the federation.³¹⁶ The Compact became effective on November 3, 1986 and, as with the RMI, the United Nations recognized the FSM as fully self-governing in free

307. Compact of Free Association, 99 Stat. at 1812 (1986); Approval of Compact of Free Association, Pub. L. No. 99-658, tit. I, § 103, 100 Stat. 3673, 3675 (1986) (repealing Title V of the Compact of Free Association Act concerning approval of the compact between the United States and the Government of the Republic of Palau).

308. Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, arts. X, XII, available at <http://www.nuclearclaimstribunal.com/177text.htm> (last visited Oct. 29, 2003); see also LEIBOWITZ, *supra* note 100, at 604 n.28.

309. Section 177 Agreement, *supra* note 308, art. IV, § 1(a).

310. Nuclear Claims Tribunal, *Welcome to the Marshall Islands Nuclear Claims Tribunal*, at <http://www.nuclearclaimstribunal.com> (last visited Nov. 5, 2003).

311. *Id.*

312. LAUGHLIN, *supra* note 190, at 521.

313. Information on the Federated States of Micronesia, *History*, at <http://www.fsmgov.org/info/hist.html> (last visited Oct. 26, 2003).

314. LAUGHLIN, *supra* note 190, at 521.

315. *Id.*

316. *Id.* Arnold Leibowitz writes: "The centrifugal forces in the FSM may be seen in the differing attitudes toward the Compact. Pohnpei voted against it, while Yap, Truk and Kosrae voted in favor [T]he Pohnpei vote was in large measure a vote for a separate identity." LEIBOWITZ, *supra* note 100, at 617.

association with the United States in Security Council Resolution 683 of December 22, 1990.³¹⁷

The self-governing status of the RMI and the FSM is codified at 48 U.S.C. § 1901-111, which affirms: “[t]he peoples of the Marshall Islands and the Federated States of Micronesia, acting through the Governments established under their respective Constitutions, are self-governing.”³¹⁸ As will be explored below, the terms of self-government include certain continuing ties to the United States, in particular with respect to arrangements for national defense. Nevertheless, the status of free association was clearly perceived as an alternative distinct from, and, according to a majority of the voters in the RMI and the FSM, preferable to, that of a commonwealth under which political and economic ties to the United States would have been stronger and more lasting.

5. Toward Free Association: Palau

Palauans participated in the July 1978 referendum on the Constitution of the Federated States of Micronesia, in which they rejected joining the FSM by a 55% to 45% margin.³¹⁹ Stanley Laughlin notes that “Palauans saw this referendum as essentially a choice between joining an all-Micronesia legal system or negotiating a separate relationship with the United States.”³²⁰ Palau adopted its own constitution on July 9, 1979; the Constitution went into effect on January 1, 1981.³²¹

The Constitution of Palau provides that 75% of registered voters must approve any bilateral agreement that authorizes the “use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare” within Palau.³²² In *Gibbons v. Salii*, the Supreme Court of Palau stated that the words “use, test, store or dispose of” in the Constitution’s nuclear control provisions are tantamount to “a general prohibition against the introduction of nuclear substances into Palau. Accordingly, these four verbs prohibit transit of nuclear powered vessels or vessels equipped with nuclear missiles.”³²³ This interpretation meant, in effect, that the Compact itself had to be approved by 75% of registered voters, since the United States insisted on the right of nuclear transit as essential to carrying out its defense obligation.³²⁴

The story of the ratification of the Palau Covenant is one of repeated referenda in which approval fell just short of the required 75%.³²⁵ A constitutional amendment adopted in 1987 provided that only a simple majority, rather than a 75% majority, would be required to overrule the anti-nuclear materials provision in the Constitution, but the Palauan

317. S.C. Res. 683, *supra* note 222, at 29. One unresolved issue is the status of Wake Island or Wake Atoll, a U.S. territory claimed by the Marshall Islands that also has its own constitution and aspiration to political independence under the name “Eneen-Kio.” Compare *Fact Sheets: U.S. Insular Areas and Freely Associated States* (stating that the civil administration of Wake Atoll is the responsibility of the U.S. Secretary of the Interior), at <http://www.doi.gov/oia/facts.html#wake> (last visited Oct. 29, 2003), with “Wake Atoll”—*A Case of Mistaken Identity for 100 Years* (arguing that the true status of the Wake Atoll is that of a “legitimate country” or a “free state” named Eneen-kio), at <http://www.enenkio.org/wq.htm> (last visited Oct. 29, 2003). At this juncture, it is unclear when or how this dispute will be settled.

318. 48 U.S.C. § 1901-111.

319. LAUGHLIN, *supra* note 190, at 505-06.

320. *Id.* at 505. For information on Palau’s move toward separate negotiations and its ultimate rejection of the FSM Constitution, see NORMAN MELLER, CONSTITUTIONALISM IN MICRONESIA 175-91 (1985).

321. McKibben, *supra* note 253, at 277 n.108.

322. PALAU CONST. art. II, § 3; McKibben, *supra* note 253, at 277.

323. *Gibbons v. Salii*, 1 ROP Intrm. 333, 348 (Palau 1986); see also LEIBOWITZ, *supra* note 100, at 625-27 (commenting on the Court’s decision).

324. See McKibben, *supra* note 253, at 278.

325. *Gibbons*, 1 ROP Intrm. at 334.

Supreme Court annulled this amendment on the grounds that it was not adopted in accordance with the Constitution.³²⁶ In 1992, a similar amendment was introduced and adopted, and on November 9, 1993, Palauan voters approved the Compact by 68% to 32% in the eighth plebiscite on the issue.³²⁷

Several factors have been cited as contributing to the ultimate approval of the Compact, including frustration with the deadlock situation, the fear that foreign investors were avoiding Palau because of the uncertainty of the islands' future political status, and the decreased fear of war with the removal of the Soviet threat in the area.³²⁸ The Covenant went into effect on October 1, 1994; 48 U.S.C. § 1931-111 provides: "[t]he people of Palau, acting through their duly elected government established under their constitution, are self-governing."³²⁹ This was confirmed by U.N. Security Council Resolution 956 of November 10, 1994, which was followed closely, as it was for the other FAS, by admission to membership in the United Nations.³³⁰

D. A Political Survey of the Freely Associated States

1. Legal Relationship to the United States Under American Law

This analysis has adopted the position that "free association" as an international legal concept encompasses a range of relationships, from the commonwealth arrangement that the United States has with Puerto Rico and the CNMI, to the explicit "compacts of free association" between the United States and the RMI, the FSM, and Palau. As explored above, Puerto Rico and the CNMI have international legal personality even though they are not sovereign states. Similarly, while the RMI, the FSM, and Palau are independent states and U.N. members, their relationship to the United States entails a degree of qualified sovereignty, especially with respect to matters of national defense, that traditionally might have been considered incompatible with the notion of sovereign statehood. While many states experience *de facto* limits on their sovereignty and independence, the compacts of free association enshrine certain *de jure* limits that have nonetheless been deemed compatible with the requirements of self-determination articulated by the U.N. Security Council.

The view has been advanced that "[t]he Compact defines an international political relationship between the United States and the FAS with little precedent in international law and none in U.S. domestic practice."³³¹ The FAS are not juridically part of the United States; Stanley Laughlin notes:

326. *Id.* at 349.

327. LAUGHLIN, *supra* note 190, at 507. Laughlin recounts:

So familiar to the voters were the issues, that when a member of the Palau Political Status Education Committee explained to a particular village for the eighth time in 10 years what the issues would be at the November 9th vote, and then asked them if they had any questions, one man answered "Just bring the ballot boxes. We'll do the rest."

Id.

328. *Id.*

329. 48 U.S.C. § 1931-111.

330. S.C. Res. 956, *supra* note 222, at 128; S.C. Res. 963, *supra* note 222, at 130 (Palau); S.C. Res. 703, *supra* note 222, at 47 (FSM); S.C. Res. 704, *supra* note 222, at 48 (RMI).

331. LEIBOWITZ, *supra* note 100, at 595; *see also* LAUGHLIN, *supra* note 190, at 484-86 (discussing the application of federal laws to the Marshall Islands). Stanley Laughlin posits: "The Compact of Free Association,

It has been suggested that there is a slight theoretical possibility that a U.S. court might find the federal Constitution applicable to a free association state because of the intimate relationship that the free association states have with the United States, and because of the control that the United States has over some of the sovereign aspects of the free association states. However, the exertion of that kind of jurisdiction seems unlikely.³³²

The parameters of the U.S. relationships with the FAS, unlike those of Puerto Rico and the CNMI, are more likely to be defined through negotiation and other diplomatic channels rather than in response to privately initiated litigation that reaches U.S. appellate courts.³³³

The status of the islands was a subject of debate during and immediately following the ratification of the Compacts, since opinions differed on whether Security Council action was required to terminate the trusteeship, or whether unilateral action by the United States was sufficient.³³⁴ In *Juda v. United States*, the Claims Court held that “[t]he President’s signature completes enactment of the Compact Act as a Congressional-Executive Agreement, a matter of domestic law,” even if its international legal effect with respect to the Trusteeship Agreement between the United States and the U.N. Security Council remained undetermined.³³⁵ This issue became irrelevant following the adoption of resolutions by the Security Council formalizing the termination of the Trusteeship.

A further issue at the time of negotiation was whether the Compact could be terminated by either side: “[t]he Micronesian position was that without the power to unilaterally terminate any agreed relationship, neither party could be considered as having the power of self-determination with respect to its political status.”³³⁶ The position actually adopted is that either party can terminate the Compact with six months’ notice, as long as agreed-upon procedures are followed, but that certain elements of the Compact will persist beyond termination, notably the security and defense arrangements.³³⁷

2. Foreign Affairs

Each FAS has control over its internal affairs and foreign relations. This arrangement is based on the 1978 “Hilo Principles,” developed during the negotiations over free

which was in the form of a legislative-executive agreement, is in the nature of a binding international agreement, similar to (or in international law identical to) a ‘treaty.’” *Id.* at 485. However, the role of the Compacts in defining a post-trusteeship relationship may warrant a higher degree of international scrutiny than do international agreements between well-established sovereign states.

332. LAUGHLIN, *supra* note 190, at 509–10.

333. Note that in *Morgan Guaranty Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1247 (2d Cir. 1991), a U.S. federal appeals court held that while Palau was part of the Trust Territory, it was not a “foreign state” for the purposes of the Foreign Sovereign Immunities Act. By contrast, in *Balos*, the court found that “notwithstanding that the RMI technically retains membership in the TTPI, it has *de facto* become a foreign state.” *Bank of Haw. v. Balos*, 701 F. Supp. 744, 745 (D. Haw. 1988). The issue of whether U.S. federal courts have diversity jurisdiction over cases involving citizens of the FAS is no longer problematic, since the Trusteeship has been terminated formally.

334. See generally LEIBOWITZ, *supra* note 100, at 596–99 (detailing the international debate on the necessity of Security Council action).

335. *Juda v. United States*, 13 Cl. Ct. 667, 682 (1987). The court explained: “[T]he Trusteeship Agreement and the Compact are two separate documents that involve different parties and raise differing legal issues. The Trusteeship Agreement is between the United States and the UNSC; the Compact is between the United States and the RMI. Trusteeship termination and Compact implementation are two separate issues.” *Id.* at 678.

336. LEIBOWITZ, *supra* note 100, at 669 (referring to *Report of the Political Status Delegation to the Congress of Micronesia*, 3d Cong., 3d Sess. 9–10 (Micr. 1970)). For a review of the termination provisions actually adopted, see LEIBOWITZ, *supra* note 100, at 672.

337. See 48 U.S.C. § 1901, arts. IV, V; 48 U.S.C. § 1931, arts. IV, V.

association.³³⁸ These principles of association allocate foreign affairs authority to the Micronesian governments, subject to the overriding security authority of the United States (later dubbed the “defense veto”).³³⁹ This section will review the major provisions on foreign affairs in the Compacts; the question of the defense veto will be addressed in a subsequent section.

The Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands provides:

- (a) The Governments of the Marshall Islands and the Federated States of Micronesia have the capacity to conduct foreign affairs and shall do so in their own name and right, except as otherwise provided in this Compact.
- (b) The foreign affairs capacity of the Governments of the Marshall Islands and the Federated States of Micronesia includes: (1) the conduct of foreign affairs relating to law of the sea and marine resources matters, including the harvesting, conservation, exploration or exploitation of living and non-living resources from the sea, seabed or subsoil to the full extent recognized under international law; (2) the conduct of their commercial, diplomatic, consular, economic, trade, banking, postal, civil aviation, communications, and cultural relations, including negotiations for the receipt of developmental loans and grants and the conclusion of arrangements with other governments and international and intergovernmental organizations, including any matters specially benefiting their individual citizens
- (d) In the conduct of their foreign affairs, the Governments of the Marshall Islands and the Federated States of Micronesia confirm that they shall act in accordance with principles of international law and shall settle their international disputes by peaceful means.³⁴⁰

Corresponding provisions can be found in the Compact of Free Association with the Republic of Palau.³⁴¹ Unlike Puerto Rico or the CNMI, the FAS are responsible for their own foreign affairs, even though the United States has authority over security and defense matters. For this reason, coordination is particularly important when these spheres of responsibility have the potential to overlap. The Compacts provide:

- (a) In recognition of the authority and responsibility of the Government of the United States under Title Three [concerning security and defense], the Governments of the Marshall Islands and the Federated States of Micronesia shall consult, in the conduct of their foreign affairs, with the Government of the United States.
- (b) In recognition of the respective foreign affairs capacities of the Governments of the Marshall Islands and the Federated States of Micronesia, the Government of the United States, in the conduct of its foreign affairs, shall consult with the Government of the Marshall Islands or the Federated States of

338. LEIBOWITZ, *supra* note 100, at 674.

339. *Id.*; see also *id.* at 648 n.48.

340. 48 U.S.C. § 1901-121.

341. *Id.* § 1931-121; *id.* § 1931-124(a).

Micronesia on matters which the Government of the United States regards as relating to or affecting any such Government.³⁴²

The Compacts also allow for the possibility of U.S. assistance or action on behalf of the FAS governments in the area of foreign affairs “as may be requested and mutually agreed from time to time.”³⁴³ In addition, the United States agrees, at the request of the FAS and subject to the consent of the receiving state, to extend consular assistance to citizens of the FAS for travel outside the United States and the FAS on the same basis as it does to U.S. citizens.³⁴⁴ Outside of the provisions in the Compacts and the subsidiary agreements, the United States renounces “all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands”³⁴⁵

3. Legal Status Under International Law

As noted above, the FAS were treated by U.S. courts as independent states even before the U.N. Security Council officially terminated the U.S. trusteeship;³⁴⁶ their international legal status as states was confirmed by the Security Council and by their admission to U.N. membership. The FAS satisfy the Montevideo Convention criteria for statehood, as they each possess (a) a permanent population, (b) a defined territory, (c) government, and (d) the capacity to enter into relations with the other states.³⁴⁷ As suggested in this analysis, however, the category of “state” appears to exist less as a discrete phenomenon in the contemporary international arena and more as a range on a spectrum encompassing a variety of territorial and political arrangements. At one end of the spectrum, and well within the internationally recognized category of “state,” are those entities that fulfill the Montevideo criteria and, in addition, possess a large degree of economic, political, and military power such that they can act largely, if rarely entirely, independent of the will of other states. Around the spectrum’s threshold between “statehood” and “non-statehood,” we find entities that, although they enjoy a great deal of formal independence and control over their internal and even foreign affairs, are nonetheless subordinate to other states in areas traditionally considered integral to sovereignty, and thus to international status in the form of sovereign statehood. It is close to this threshold, but nevertheless on the “statehood” side, that we might locate the arrangements enshrined in the compacts of free association. On the other side of the threshold, we would locate commonwealth arrangements such as those of the CNMI and Puerto Rico, and even farther away from the threshold, we would locate the “states” of the United States, which together form the federal Union.³⁴⁸

Despite this apparent flexibility of the notion of “statehood” in certain circumstances, the question arose between the signing of the Compacts of Free Association and the Security Council termination of the Trusteeship whether the FAS “ha[d] sufficient international personality to be accorded the status of a nation-state in international law.”³⁴⁹

342. *Id.* § 1901-123; *see also id.* § 1931-123.

343. *Id.* § 1901-124; 48 U.S.C. § 1931-127; *see also id.* § 1901-125; *id.* § 1931-126.

344. *Id.* § 1901-126; *id.* § 1931-128.

345. *Id.* § 1901-127; 48 U.S.C. § 1931-125.

346. *See supra* note 330 and accompanying text.

347. Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, art. 1.

348. *See infra* Appendix.

349. LEIBOWITZ, *supra* note 100, at 596.

The FAS present a hybrid model: they issue their own travel documents,³⁵⁰ but their currency is the U.S. dollar. Although the Compacts initially provided otherwise, the representatives exchanged between the FAS and the United States are accorded ambassadorial rank.³⁵¹ The largest obstacle to considering the FAS completely independent, pace the Security Council's resolutions, lies in the arrangements for security and defense with the United States, some of which would persist even beyond the termination of the Compact by either party. It is to this complication that we now turn.

4. The Question of Military Servitudes

The Constitutions of each FAS are technically supreme within their respective territories.³⁵² As noted above, a conflict between one of the provisions of the proposed Compact and Palau's constitutional prohibition on the "use, testing, storage or disposal" of nuclear materials was the core issue underlying the prolonged delay in Palau's attaining FAS status.³⁵³ The reconciliation of U.S. security needs with FAS independence is a matter of both theoretical and practical concern. The history of the TTPI illustrates the military and strategic importance of these islands, and explains the United States's continued interest in (1) access to the islands for military purposes and (2) exclusion of other countries' troops and installations from the area. These may be referred to respectively as the "use" and "denial" components of the U.S. strategic interest in the FAS.

The potential tension between the United States's desire for input into and control over the strategic use of the islands and the achievement by the former TTPI of complete political independence has frequently been noted. Stanley Laughlin writes of the Marshall Islands negotiations:

Part of the concern over the status of free association had to do with the duties and responsibilities of the United States. The United States is obligated under the Compact of Free Association to defend the Marshall Islands as if they were part of the United States. In return for this commitment, the United States retains certain military rights in the Marshall Islands and, even more controversially, maintains a veto over actions taken by the Marshall Island[s] government which the United States considers inconsistent with its own obligation to defend the Marshalls.³⁵⁴

The Compacts and their subsidiary agreements "provide for a U.S. defense umbrella during the life of free association and indefinite exclusion of third-country military forces *even if any FAS opts for independence*."³⁵⁵

350. *Id.* at 600.

351. *See id.*

352. *See, e.g.,* LAUGHLIN, *supra* note 190, § 23.3, at 77 (Cumulative Supp. 1997) ("In the Republic of the Marshall Islands, the Marshall Islands Constitution is the supreme law of the land. Hence, the Marshall Islands government and its officials cannot act contrary to it in exercising or discharging rights or obligations under the Compact.").

353. *See supra* notes 322–327 and accompanying text (explaining that the Compact itself required 75% of registered voters' approval because the United States insisted on the right of nuclear transit to carry out its defense obligation).

354. LAUGHLIN, *supra* note 190, at 483.

355. LEIBOWITZ, *supra* note 100, at 596 (emphasis added); *see also id.* at 685 ("Since the Mutual Security Agreements with FSM and the Marshall Islands require mutual agreement for termination, the strategic denial of the FAS is indefinite."). For more on the subsidiary agreements, see Arthur John Armstrong & Howard Loomis Hills, *The Negotiation for the Political Status of Micronesia (1980–1984)*, 78 AM. J. INT'L L. 484 (1985).

Aside from the lease of Kwajalein Atoll as a U.S. missile testing site, the issue of a strong U.S. military presence in the FAS has been largely hypothetical.³⁵⁶ Nevertheless, the theoretical question is not without interest. The “use” provisions of the Compacts have analogies in other international arrangements for the use of foreign military installations; in these situations, it remains a matter of international concern whether the terms of a treaty, although exhibiting “reciprocity in form and law,” nonetheless fail to reflect “reciprocity in fact.”³⁵⁷ John Woodliffe notes in a chapter on the subject:

A typical situation where extra legal influences are much in evidence is where a newly independent state grants to the former colonial or administering power, military base rights or similar facilities pursuant to a treaty concluded contemporaneously with or shortly after accession to statehood.³⁵⁸

A review of contemporary state practice in this area suggests that (1) the existence of such treaties does not per se undermine the status of former colonies or trust territories as independent states; and (2) as long as there is no manifest political will on the part of the newly independent state against the existence of such arrangements, the treaties do not fall into the category of “unequal treaties” whose validity may be impeached on ethical, if not strictly legal, grounds.³⁵⁹

Title Three of each Compact contains the basic security and defense provisions, which are elaborated in corresponding supplemental agreements. Title Three, Section 311 of the FSM and RMI Compact provides:

- (a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.
- (b) This authority and responsibility includes:

356. See, e.g., LEIBOWITZ, *supra* note 100, at 617 (“The Compact of Free Association with the FSM is unique in that no active military role is envisioned anywhere in the FSM. The United States has not requested any land options in the FSM, nor does the U.S. foresee any need for military bases or installations on the islands.”).

How important Palau really is to the United States from a military point of view is a subject of debate, much of it related to contingency planning if the United States loses its bases in the Philippines. Absent that, some regard the nuclear option as extremely unlikely. Palau’s military role more likely hinges in supplying logistical support services in a conventional Pacific-wide war and the advantage of its deep-water port.

Id. at 637.

357. JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* 67 (1992); see also *Customs Régime*, 1931 P.C.I.J. at 52 (arguing that reciprocity in law exists within a customs regime treaty between Austria and Germany where Austria retains the ability to denounce the treaty).

358. WOODLIFFE, *supra* note 357, at 67; see generally *id.* at 67–77 (discussing examples and the legal ramifications of such state grants of military bases).

359. *Id.* at 77; see also INGRID DETTER DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 195–219 (2d ed. 1987) (exploring the notion of “unequal treaties” and focusing on military base agreements which comprise the bulk of unequal treaties); KYPROS CHRYSOSTOMIDES, *THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW* 72 (2000) (“The Treaty of Guarantee [between the Republic of Cyprus, Greece, Turkey, and the United States] contains express recognition of the independence and territorial integrity and security of the Republic [Thus,] [i]n no way can it be construed . . . so as to mean variation from the sovereignty or independence of Cyprus leading to its limitation.”).

- (1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples from attack or threats thereof as the United States and its citizens are defended;
- (2) the option to foreclose access to or use of the Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and
- (3) the option to establish and use military areas and facilities in the Marshall Islands and the Federated States of Micronesia, subject to the terms of the [subsidiary agreements].³⁶⁰

Section 316 prohibits the transfer or assignment of this authority and responsibility. Section 331 provides:

Subject to the terms of this Compact and its related agreements, the Government of the United States, exclusively, shall assume and enjoy, as to the Marshall Islands and the Federated States of Micronesia, all obligations, responsibilities, rights and benefits of:

- (a) Any defense treaty or other international security agreement applied by the Government of the United States as Administering Authority of the Trust Territory of the Pacific Islands as of the day preceding the effective date of this Compact.
- (b) Any defense treaty or other international security agreement to which the Government of the United States is or may become a party which it determines to be applicable in the Marshall Islands and the Federated States of Micronesia.

Such a determination by the Government of the United States shall be preceded by appropriate consultation with the Government of the Marshall Islands or the Federated States of Micronesia.³⁶¹

Section 341 permits the voluntary service of FAS citizens in the U.S. armed forces, but insulates them from involuntary induction.³⁶² Section 352 codifies the responsibility of the United States in exercising its Title Three powers to “accord due respect to the authority and responsibility of the Governments of the Marshall Islands and the Federated States of Micronesia under Titles One, Two and Four and to their responsibility to assure the well-being of their peoples.”³⁶³

360. 48 U.S.C. § 1901-311. The parallel provision for Palau is codified at 48 U.S.C. § 1931-312.

361. 48 U.S.C. § 1901-331. The parallel provision for Palau is codified at 48 U.S.C. § 1931-331.

362. 48 U.S.C. § 1901-341. The parallel provision for Palau is codified at 48 U.S.C. § 1931-341.

363. 48 U.S.C. § 1901-352. The parallel provision for Palau is codified at 48 U.S.C. § 1931-352, and is slightly more expansive:

In the exercise of its authority and responsibility under this Compact, the Government of the United States shall accord due respect to the authority and responsibility of the Government of Palau under this Compact and to the responsibility of the Government of Palau to assure the well-being of Palau and its people. The Government of the United States and the Government of Palau agree that the authority and responsibility of the United States set forth in this Title are exercised for the mutual security and benefit of Palau and the United States, and that any attack on Palau would constitute a threat to the peace and security of the entire region and a danger to the United States. In the event of

Nothing in this arrangement seems per se objectionable: in return for security and protection, the FAS agree to give the United States strategic discretion and exclusivity with respect to the potential military activities of third countries. Perhaps more questionable under a general theory of contract law are the “survivability” provisions of this arrangement under Article V of the respective Compacts.³⁶⁴ Section 453(a) of the Palau Compact provides: “[t]he provisions of Section 311, even if Title Three should terminate, are binding and shall remain in effect for a period of 50 years and thereafter until terminated or otherwise amended by mutual consent.” Section 311 specifies: “[t]he territorial jurisdiction of the Republic of Palau shall be completely foreclosed to the military forces and personnel or for the military purposes of any nation except the United States of America, and as provided for in Section 312.” In other words, U.S. consent would be required to terminate the exclusivity or “denial” provision even after the termination of the Compact by either side.³⁶⁵ As affirmed above, this arrangement does not negate the independent status of the FAS under international law, but it does mark a key difference between the FAS and other sovereign states, one that should not be underestimated in a review of the implications of free association arrangements.

5. Participation in the International Process

The Compacts of Free Association provide explicitly that “the Governments of the [FAS] have the capacity to enter into, in their own name and right, treaties and other international agreements with governments and regional and international organizations.”³⁶⁶ The following table summarizes the involvement of the FAS in various international organizations and treaties, testimony to the active participation of the FAS as members of international society:

such an attack, or threat thereof, the Government of the United States would take action to meet the danger to the United States and Palau in accordance with its constitutional processes.

Id.

364. See 48 U.S.C. § 1901-452(a)(3) & § 1901-453(a)(2); 48 U.S.C. § 1931-452(b) & § 1931-453(a).

365. An interesting comparison might be Article 9 of the 1946 Constitution of Japan, which reads:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

KENPÔ, art. 9.

The mechanisms for constitutional amendment are unilateral, whereas the mechanisms for treaty renunciation in the case of the security and defense provisions of the FAS are bilateral and require mutual consent; however, the origins of the Japanese Constitution in the aftermath of World War II suggest that one’s attitude towards the legitimacy of Article 9 might bear on one’s willingness to accept the potential obligation in perpetuity enshrined in Title Three.

366. 48 U.S.C. § 1901-121(c); see also 48 U.S.C. § 1901-122 (stating that the United States will support applications by the RMI and FSM to participate in international organizations); 48 U.S.C. § 1931-122 (stating that the United States will support an application by Palau to participate in international organizations).

	Republic of the Marshall Islands³⁶⁷	Federated States of Micronesia³⁶⁸	Republic of Palau³⁶⁹
African, Caribbean and Pacific Group of States	Member (M)	M	M
Asian Development Bank	M	M	
Economic and Social Commission for Asia and the Pacific	M	M	M
Food and Agriculture Organization	M		M
Group of 77	M	M	
International Atomic Energy Agency	M		
International Bank for Reconstruction and Development (World Bank)	M	M	M
International Civil Aviation Organization	M	M	M
International Red Cross and Red Crescent Movement			M
International Development Association	M	M	M
International Finance Corporation	M	M	M
International Federation of Red Cross and Red Crescent Societies			M
International Monetary Fund	M	M	M

367. Table based on information from World Factbook III, *supra* note 271; *see also* Republic of the Marshall Islands, *Diplomatic Relations*, at <http://www.rmiembassyus.org/government/relations.html> (last visited Oct. 29, 2003).

368. Table based on information from World Factbook IV, *supra* note 281; *see also* Government of the Federated States of Micronesia, *Countries with Which the Federated States of Micronesia has Established Diplomatic Relations as of Oct. 22, 2001*, at <http://www.fsmgov.org/diprel/index.html> (last visited Oct. 29, 2003).

369. Table based on information from World Factbook V, *supra* note 291.

	Republic of the Marshall Islands	Federated States of Micronesia	Republic of Palau
International Maritime Organization	M		
International Mobile Satellite Organization	M		
International Telecommunications Satellite Organization	Non-signatory User	M	
International Olympic Committee		M	M
International Criminal Police Organization (Interpol)	M		
International Telecommunication Union	M	M	
Organization for the Prohibition of Chemical Weapons	M	M	
South Pacific Regional Trade and Economic Cooperation Agreement	M	M	M
South Pacific Commission	M	M	M
South Pacific Forum	M	M	M
United Nations	M	M	M
United Nations Conference on Trade and Development (UNCTAD)	M	M	M
United Nations Educational, Scientific and Cultural Organization (UNESCO)	M	M	M
World Health Organization	M	M	M
World Meteorological Organization		M	

	Republic of the Marshall Islands	Federated States of Micronesia	Republic of Palau
Convention on Biological Diversity	Party (P)	P	P
United Nations Framework Convention on Climate Change	P	P	P
Kyoto Protocol to United Nations Framework Convention on Climate Change	Signatory	P	P
United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa	P	P	P
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal		P	
United Nations Convention on the Law of the Sea	P	P	P
Montreal Protocol on Substances that Deplete the Ozone Layer	P	P	
Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 (MARPOL)	P		

V. CONCLUSION

Associations, like other legal and political relationships, carry both benefits and burdens. The role of international law is to establish parameters within which communities can determine for and among themselves what arrangements are most conducive to achieving their social and political ends. The range of available options involves varying degrees of internal and external sovereignty; in an age of interdependence, no state can claim that its sovereignty is absolute. International law accepts a variety of *de facto* and *de jure* arrangements that seek to promote the stability and viability of territorial communities while ensuring the dignity and fundamental freedoms of their members.

The option of associated statehood, always considered a legitimate middle path between independence and integration, may be especially attractive to territorial communities seeking the benefits of autonomy within the protective umbrella offered by a formal relationship with a more powerful state. Such arrangements, properly constructed, can further the goal of self-determination, understood as a community's ability to promote its core values and ensure the dignity and security of its members in accordance with the requirements of international law.

The examination of the history, negotiation, and operation of the associations between Puerto Rico and the United States and the former Trust Territories of the Pacific Islands and the United States demonstrates the flexibility of this relationship in contemporary international law. A number of conclusions may be drawn:

First, associated status is lawful under international law and the mere fact that a state establishes a permanent relationship with another state in which some of its competences are assigned to that other state is not inherently pathological. The critical question from the standpoint of international law is whether the association is voluntary.

Second, there do not appear to be any minimal requirements for a lawful association. The lawfulness of each association is assessed on the basis of the consent of the parties and the context.

Third, because associations are frequently established on a permanent basis, it would appear that subsequent developments in international law could bring into question the lawfulness of inherited arrangements, even though they may have been quite acceptable at the time of their creation. In this respect, associations may require ongoing appraisal by the international community and periodic readjustment.

In view of the rapid development of international law and the effort to establish formal and permanent institutional links between states in an association, some form of continuing international scrutiny would appear desirable. One possibility would be to assign to an appropriate body within the United Nations the responsibility for conducting periodic review, based on reports by the principal and associated state, of the continuing conformity of the association to the requirements of contemporary international law. The variety and flexibility of acceptable arrangements suggest a need for vigilance in ensuring that associations do not develop pathological characteristics over time. Associations will remain a matter of inclusive concern for the international community as the relationships between territorial communities, and the international legal and political context in which they are embedded, continue to evolve.

VI. APPENDIX

Diagram Illustrating the Range of Self-Determination Options

